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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956

No. 564 37

UNITED STATES OF AMERICA, APPELLANT

vs.

TOWNSHIP OF MUSKEGON, A MUNICIPAL
CORPORATION, ET AL.

No. 565 38

CONTINENTAL MOTORS CORPORATION, ETC.,
APPELLANT

vs.

TOWNSHIP OF MUSKEGON, A MUNICIPAL
CORPORATION, ET AL.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF
MICHIGAN

FILED NOVEMBER 13, 1956

PROBABLE JURISDICTION NOTED JANUARY 14, 1957

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LIST OF CALENDAR AND JOURNAL ENTRIES

Date

1955

Feb. 1 Declaration, filed.

1 Summons Issued—Returnable 2-28-55, Amount \$100,000.00, filed.

7 Summons, filed—Served on February 2, 1955.

10 Answer, filed.

15 Petition of the United States for Leave to Intervene & Intervening Petition, filed.

15 Stipulation Allowing United States to Intervene, filed.

15 Order, filed.

15 Reply, filed.

15 Journal Entry—Ordered that United States of America is Granted Permission to Intervene as Party Defendant; Further Ordered that Petition filed is adopted—and to be Considered as Intervening Petition of the United States of America —Copies to be served to Attorneys for Plaintiffs, entered and filed. 42 584

- 16 Journal Entry → Trial not Demanded — Court heard Proofs—Took said matter under advisement, entered and filed. 44 150
- June 29 Opinion, filed.
- Aug. 23 Order Staying Proceedings on Judgment, filed and entered. 44 292B
- 23 Journal Entry—Ordered that Judgment is entered in favor of Plaintiffs and against Defendant—in amount of \$84,658.20, entered and filed. 44 292C
- Sept. 1 Notice of Entry of Judgment, filed.
- 1 Affidavit of Service, filed.
 - 7 Claim of Appeal, filed.
 - 8 Affidavit of Service of Claim of Appeal, filed.
 - 8 Notice of Claim of Appeal, filed.
- 23 Order and Motion Extending Time for Settlement of Bill of Exceptions, filed.
- Oct. 11 Motion and Order Extending Time for Settlement of Bill of Exceptions filed. (Time extended to include Nov. 5, 1955)
- 28 Bill of Exceptions, filed.
- Nov. 1 Return to Supreme Court made.

IN THE
SUPREME COURT

APPEAL FROM THE CIRCUIT COURT
FOR THE COUNTY OF MUSKEGON

Honorable Raymond L. Smith, Circuit Judge, Presiding

TOWNSHIP OF MUSKEGON,
a municipal corporation,
COUNTY OF MUSKEGON,
a municipal corporation,
ORCHARD VIEW RURAL AGRICUL-
TURAL SCHOOL DISTRICT NO. 5,
MUSKEGON TOWNSHIP,
a municipal corporation,

Plaintiffs and Appellees

— vs —

CONTINENTAL MOTORS
CORPORATION,
a Virginia corporation doing business in
the State of Michigan,

Defendant and Appellant

and

UNITED STATES OF AMERICA,
Intervening Defendant and Appellant

Calendar No. 46679

RECORD ON APPEAL

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BUTZEL, EAMAN, LONG,
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1881 National Bank Building
Detroit 26, Michigan.

" and
JOSEPH T. RILEY
715 Hackley Union National
Bank Bldg.
Muskegon, Michigan
Attorneys for Defendant and
Appellant

WENDELL A. MILES
United States Attorney
Western District of Michigan
Grand Rapids 1, Michigan
Attorney for Intervening
Defendant and Appellant

DECLARATION

(Filed February 1, 1955)

Now come the plaintiffs in the above entitled cause, by their respective attorneys, and allege:

I.

That plaintiffs, the Township of Muskegon, the County of Muskegon and the Orchard View Rural Agricultural School District No. 5, Muskegon Township, are each bodies corporate under the Constitution and laws of the State of Michigan; that the defendant, Continental Motors Corporation, is a body corporate organized under the laws of the State of Virginia and authorized to and doing business in the State of Michigan with offices in the City of Muskegon, County of Muskegon, and State of Michigan.

II.

That the following described land is within the geographic boundaries of the County of Muskegon, the Township of Muskegon, and the said Orchard View Rural Agricultural School District:

Parcel Number One

SECTION 16-10-16

Comm. at NW cor. of SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, th N along W Sec. line 298.1 ft., th N 88 degrees 15' 35" E 2580 ft., th S 297.83 ft. to S $\frac{1}{8}$ line of Sec. 16, th W on said $\frac{1}{8}$ line 2580 ft. to pt. beg.

and

Parcel Number Two

SECTION 16-10-16

Comm. on W line Sec. 16 620 ft. N of SW cor of sd Sec., th N 701.9 ft. to NW cor. of SW $\frac{1}{4}$ SW $\frac{1}{4}$, th E Along S $\frac{1}{8}$ ln of Sec. 16 2580 ft., th S 637.62 ft., th S 88 degrees 12' 20" W 1238.85 ft., th S 0 degrees 02' 30" E along E

In SW $\frac{1}{4}$ SW $\frac{1}{4}$ 38.85 ft., th S 88 degrees 04' 20" W
1341 ft. to pl. beg.

III.

That legal title to the above described land became vested in the United States of America by virtue of a deed running from the Reconstruction Finance Corporation to the said United States of America, dated May 6, 1953, recorded December 9, 1953, in Liber 631, pages 351 through 356 and the said land, as such, became exempt from taxation under the laws of the United States of America and the laws of the State of Michigan prior to January 1, 1954.

IV.

That on January 1, 1954, and continuously throughout the year 1954, the above described land was occupied and used by the defendant, Continental Motors Corporation, under an arrangement with the United States of America or one of its agencies whereby the said land was leased, loaned or otherwise made available to and used by the said Continental Motors Corporation; that the said Continental Motors Corporation was on January 1, 1954, and continuously throughout the year 1954, engaged in business for profit and the said corporation used the land on January 1, 1954, and continuously throughout the said year 1954 in connection with its business conducted for profit; that the said land was so used exclusively by Continental Motors Corporation and such use was not by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property available to the use of the general public, and no payments were made in lieu of taxes relative to the said land by the federal government or any of its agencies.

V.

That pursuant to the provisions of Act 189 of the Public

Acts of 1953, M.S.A. 7.7 (5), entitled "An Act to provide for the taxation of lessees and users of tax-exempt property," taxes and collection fees in the following amounts were assessed to the defendant Continental Motors Corporation for the year 1954:

As to Parcel Number One described above:

County	\$ 4151
Township	15.22
School	116.23
School Extra	58.80
<hr/>	
Total	\$231.76
Collection fee	2.32
<hr/>	
Total	\$234.08

As to Parcel Number Two described above:

County	\$23,949.00
Township	8,781.00
School	27,141.00
School Extra	23,949.00
<hr/>	
Total	\$83,820.00
Collection fee	832.20
<hr/>	
Total	\$84,658.20

That the said defendant Continental Motors Corporation has wholly neglected and refused to pay the aforesaid taxes or any part thereof; that the said taxes are now due and payable and constitute a debt due from the said defendant Continental Motors Corporation to the Township of Muskegon, the County of Muskegon and the said Orchard View Rural Agricultural School District in the amounts above indicated.

VI.

That the causes of action of each of the plaintiffs herein arise out of the same transaction, to-wit: the taxes assessed to Continental Motors Corporation for the year 1954 involve the same questions of fact and law and are united to avoid a multiplicity of suits and in order to promote the convenient administration of justice in keeping with the provisions of M.S.A. 25.591.

VII.

WHEREFORE plaintiffs pray that a judgment be entered in favor of the plaintiffs and against the defendant in the amount of \$84,892.28, together with interest and penalties as by statute provided, together with plaintiffs' costs and disbursements relative to this proceeding.

Charles A. Barnard

Attorney for the Township of
Muskegon.

Robert A. Cavanaugh

Prosecuting Attorney for
Muskegon County.

STREET & SORENSEN

By Harold M. Street

Attorneys for Orchard View Rural
Agricultural School District

No. 5, Muskegon Township.

ANSWER
(Filed February 10, 1955)

Now comes CONTINENTAL MOTORS CORPORATION, a Virginia corporation, defendant in the above entitled cause, by JOSEPH T. RILEY, and BUTZEL, EAMAN, LONG, GUST & KENNEDY, its attorneys, and files this, its Answer to the Declaration herein, and says:

I.

The allegations of Paragraph I of the Declaration are admitted.

II.

The allegations of Paragraph II of the Declaration are admitted.

III.

Answering Paragraph III of the Declaration, Defendant says:

(a) That under date of May 6, 1953 Reconstruction Finance Corporation executed and thereafter caused to be delivered a certain quit-claim deed wherein such corporation conveyed, remised and released unto The United States of America, the grantee and its assigns, all of the said corporation's right, title and interest in and to the land described in the Declaration filed in this cause, and such deed was recorded on December 9, 1953 in Liber 631 of Deeds at pages 351 through 356 in the records of the Register of Deeds for Muskegon County, Michigan.

(b) That from June 1, 1948 and continuously, and at all times thereafter, to May 6, 1953, The United States of America was vested with all of the incidents and duties of ownership of said land and although the bare title (with no incidents of ownership) was in Reconstruction Finance Corporation until May 6, 1953, as a matter of

law The United States of America was the absolute owner thereof and by virtue thereof said land was exempt and immune from taxation by the State of Michigan and any subdivision thereof.

(c) That said land was owned by The United States of America and was exempt and immune from taxation prior to January 1, 1954 and was so owned and exempt and immune from taxation on tax day, i.e. January 1, 1954, and during the whole of the calendar year of 1954.

To the extent that the allegations contained in Paragraph III of the Declaration are inconsistent with the foregoing, they are denied.

IV.

Answering Paragraph IV of the Declaration, Defendant says:

(a) That on or about June 30, 1952, The United States of America granted the Defendant the right to use and occupy the land described in the Declaration and the buildings thereon "without the payment of rental therefor" only "for the production of supplies in the performance of contracts or subcontracts under prime contracts with the Ordnance Corps and with contracts or subcontracts under prime contracts" with The United States of America which the Defendant had entered into prior to 30 June 1952 (which were itemized and described), "and such other contracts as may be approved in writing by the Contracting Officer in accordance with the terms and conditions of Supplement No. 7 to Contract No. DA-20-018-ORD-11272" (being a contract between The United States of America and Defendant), so long as the use of the said land and buildings was required by the Defendant for such production; that such use could be terminated at will by the Government; that under and

pursuant to the Armed Services Procurement Regulations the said contract was required to be terminated when the facilities covered thereby were no longer required for the performance of the Government contracts, unless such termination be detrimental to the Government's interest; and and on tax day, i.e. January 1, 1954, the said land and buildings were being used by Defendant pursuant to such grant and solely for the purposes above set forth.

(b) That in said Contract No. DA-20-018-ORD-11272, as amended and in effect on and prior to tax day, i.e. January 1, 1954, the Defendant further agreed that it would not make any charge whatsoever to the Government (The United States of America) in any contract with the Government or in the prices charged to any contractor with which it might do business when such contractor was a prime contractor with the Government or was a subcontractor under a prime contract with the Government for rental or use of the plant; and no such charge was made by Defendant during the calendar years 1953 and 1954.

(c) That Defendant continued to use and occupy such lands, buildings, improvements, appurtenances and building installations under and pursuant to the contract, as amended, above described, until on or about May 18, 1954 when (the Secretary of the Army having previously determined it was necessary in the interest of national defense to provide facilities owned by The United States of America for the manufacture of various military engines and parts therefor), The United States of America and the Defendant entered into a written agreement termed "Contract DA-20-018-ORD-13262," which contract was made as of the 26th day of October, 1953 wherein, among other things, (i) The

United States of America granted the Defendant "the right to use and occupy the land, buildings, improvement, installation and appurtenances thereunto belonging," (being the land, with buildings thereon, described in the Declaration herein), "for the production of various military engines and parts therefor under" certain "Government contracts and subcontracts with Government Contractors—without the payment of rental therefor" and, under and pursuant to the Armed Services Procurement Regulations Defendant's use is and was limited to the foregoing; (ii) it was agreed that the Defendant's right to use the facilities might "be terminated by the Government—in whole or in part, whenever the Contracting Officer shall determine that such termination is in the best interests of such Government;" and (iii) it was further agreed that no part of the cost of such plant "in the form of depreciation or amortization" would be "included in the price of the end items under the related supply contracts" for which such plant was authorized for use; and no part of such cost has been so included by this Defendant.

(d) Defendant admits that during the whole of the calendar year 1954 it was engaged in business for a profit but says that when it used the said land and buildings, as it did in 1954, it did so for the production of goods for The United States for national defense purposes as provided by the two contracts above described.

To the extent the allegations contained in Paragraph IV of the Declaration are inconsistent with the foregoing, they are denied.

V.

Defendant admits that the assessing officer purported to assess to the Defendant certain taxes in the amounts stated

in the Declaration for the year 1954 pursuant to the provisions of Act No. 189 of the Public Acts for the State of Michigan for 1953, but it denies any valid assessment was made but to the contrary says that said purported assessment was unlawful, void, unenforceable and of no force and effect for the following reasons:

(a) Act No. 189 of the Public Acts of the State of Michigan for 1953 does not nor was it intended nor can it be construed so as to include an authorization to assess and collect taxes from those, such as the Defendant, who occupy and use property of The United States of America, which is immune from taxation. If such Act is construed to authorize such assessments and taxes, the Act would be void, unconstitutional and infringe upon the immunity of the Federal Government in all the respects hereinafter set forth in this Paragraph V.

(b) The aforesaid Act No. 189 (i) is vague, uncertain, incomplete and ambiguous in that, among other things, Section 1 thereof fails to state what or who is subject to taxation and Section 2 thereof fails to state what taxes shall be assessed and further fails to adequately describe which lessees or users of real property are to be assessed; (ii) is unconstitutional and repugnant to the Constitution of the State of Michigan and particularly Article X, Section 6 thereof, in that such Act does not distinctly state the tax nor the objects to which it is to apply but rather refers to the provisions of The general property tax act of the State of Michigan to fix the tax and the object thereof; (iii) is unconstitutional and repugnant to the Constitution of the State of Michigan, and particularly Article X, Section 7 thereof, in that such Act does not provide for the assessment on property nor the assessment of Defendant's interest at its cash value, and (iv) even if such Act did authorize an assessment of Defend-

ant's possessory interest; on its face it provides for such assessment at a value other than and greatly in excess of its true cash value.

(e) Act No. 189, Public Acts of 1953, is void because:

(1) The State of Michigan and its subdivisions do not have the power (i) to assess or tax lands belonging to The United States of America when such sovereign has not waived its immunity; (ii) to assess or tax one who is using such lands with the consent and only at the will of the sovereign owner; (iii) to assess or tax any such user in the same amount and to the same extent as though he was the owner of the lands; nor (iv) to assess or tax any such user, who uses such lands to produce items ordered for the national defense by the sovereign owner, in the same amount and to the same extent as though such user was the owner of the lands; and such Act, if given effect herein, would accomplish the assessment and taxation of either such lands or user and, therefore, is void as being repugnant to the provisions of the Constitution of The United States, as amended, including, without limitation, each of the following parts:

Article I, Section 8, Clause (18),

Article IV, Section 3, Clause (2),

Article VI, Clause (2), and

Article XIV, Section 1 of the Articles in Addition To
and Amendment of such Constitution.

(2) If given effect herein, the Act would be an infringement upon the immunity of the Federal Government, its possessions and activities from any form of state taxation in that the Act, when construed, does in law authorize the imposition of an ad valorem general property tax upon the tax-immune lands above

described since it is computed not upon the user's interest in such lands but rather upon such land to the full extent of the interest of The United States of America, i.e. the value of such property, including the whole ownership interest as well as whatever value proper appraisal might attribute to the interest of the user of such property.

Further answering the allegations of Paragraph V of the Declaration, the Defendant admits it has not paid the said taxes but denies that they are due and payable and constitute a debt due as alleged, for all the reasons hereinabove set forth.

VI.

The Defendant admits, as averred in Paragraph VI of the Declaration, that the various taxes assessed involve the same questions of fact and law but Defendant neither admits nor denies the remaining allegations of such paragraph for want of sufficient information or knowledge to form a belief with respect thereto and therefore it leaves to the Court herein the determination of whether there are sufficient grounds appearing to unite the causes of action in order to promote the convenient administration of justice.

Further answering the aforesaid Declaration, Defendant says:

1. That although not required by law so to do, on March 8, 1954, if appeared before the Board of Review for the Township of Muskegon and asked that the assessment, upon which the 1954 taxes herein are based, be stricken from the assessment rolls and at that time delivered to such Board of Review Defendant's written protest of and request for the elimination of such assessment on sub-

stantially the grounds set forth in Paragraph V of this Answer.

2. That said Board of Review did not strike such assessment from the rolls. Although not required by law so to do, on or about April 17, 1954 Defendant in writing complained of such assessment to the State Tax Commission, which Commission accepted such complaint for investigation on or about April 20, 1954. Thereafter, such Commission adopted a resolution denying the appeal to it because such Commission did not believe it was a function thereof to rule on the validity or the invalidity of a legislative act.

WHEREFORE, Defendant claims a judgment of no cause for action.

Dated this 10th day of February, A.D. 1955.

Joseph T. Riley
715 Hackley Union National Bank Bldg.
Muskegon, Michigan

and

Butzel, Eaman, Long, Gust & Kennedy

By Clifford W. Van Blarcom
1881 National Bank Building
Detroit 26, Michigan

REPLY

(Filed February 15, 1955)

Plaintiffs, by their respective attorneys, reply to the affirmative matters alleged in defendant's answer as follows:

I.

Since no affirmative matters are alleged in paragraph I of the said Answer no reply is made thereto.

II.

Since no affirmative matters are alleged in paragraph II of the said Answer no reply is made thereto.

III.

- (a) Since sub-paragraph (a) of Paragraph III of the said Answer merely re-alleges facts alleged in plaintiff's declaration, no reply is made thereto.
- (b) Since only conclusions of law are alleged in sub-paragraph (b) of paragraph III, which, though erroneous, are considered irrelevant and immaterial to this proceeding, plaintiffs make no reply thereto and move that same be stricken.
- (c) Since sub-paragraph (c) of paragraph III is a re-allegation of facts alleged in plaintiffs' declaration, no reply is made thereto.

IV.

Plaintiffs regard all affirmative matters alleged in paragraph IV sub-paragraphs (a), (b), (c) and (d) as irrelevant and immaterial to this proceeding. Plaintiffs make no reply thereto and move that same be stricken.

V.

Plaintiffs deny the conclusions of law alleged in paragraph V and sub-paragraphs (a), (b) and (c) thereof to the effect that the assessment was unlawful and that Act No. 189 of the Public Acts of 1953 is unconstitutional or otherwise void.

VI.

Since no affirmative matters are alleged in the first part of paragraph VI, no reply is made thereto. As to the further matters alleged, plaintiffs admit that defendant appeared before the Board of Review and asked that the assessment be stricken from the rolls, that the Board of Review refused to strike the assessment from the rolls; that defendant appealed to the State Tax Commission and that the State Tax Commission denied the appeal for the reasons stated in defendant's answer.

Charles A. Larnard
Attorney for the Township of
Muskegon.

Robert A. Cavanaugh
Prosecuting Attorney for
Muskegon County.
STREET & SORENSEN

By Harold M. Street
Attorneys for Orchard View Rural
Agricultural School District
No. 5, Muskegon Township.

PETITION OF UNITED STATES FOR LEAVE TO
INTERVENE AND INTERVENING PETITION
(Filed February 15, 1955)

The United States of America by its attorney, Wendell A. Miles, United States Attorney for the Western District of Michigan, respectfully alleges that it has a real and substantial interest in the matter in litigation and therefore desires to become a party to the litigation by uniting with the defendant in the obtaining of the relief sought in this action and as grounds therefor alleges:

I.

That the intervenor adopts and incorporates herein by reference all of the allegations and conclusions contained in the defendant's Answer.

II.

That by reason of the facts so alleged, your petitioner has an interest in this cause which it is entitled to protect by intervention herein. Wherefore, your petitioner, United States of America, respectfully prays that leave be granted to it to intervene in this cause; that an order be entered allowing intervention; and that this petition for leave to intervene be considered and adopted by this Court as the intervening petition of the United States.

Your petitioner further prays that the judgment prayed for by the defendant in its answer be entered and that the Court grant such other and further relief as it may deem proper.

UNITED STATES OF AMERICA
Wendell A. Miles
United States Attorney
Attorney for Petitioner

Dated: Feb. 14, 1955

ORDER GRANTING UNITED STATES LEAVE
TO INTERVENE
(Filed February 15, 1955)

The petition of the United States of America for Leave to Intervene as a party defendant in said cause having been duly filed, and further, a stipulation having been executed by and between all of the parties hereto whereby it is stipulated and agreed that the petition should be granted, and the Court being fully advised in the premises,

IT IS ORDERED:

That the United States of America be, and is hereby granted permission to intervene in said cause as a party defendant therein; and

IT IS FURTHER ORDERED:

That the said petition heretofore filed is adopted and is to be considered as the Intervening Petition of the United States of America, and that a copy thereof shall be served upon the attorneys for the plaintiffs.

Dated: At Muskegon, Michigan, this 15th day of Feb., 1955.

Noel P. Fox
Circuit Judge

STIPULATION OF FEB. 15, 1955
(Filed in Open Court February 16, 1955)

It is hereby stipulated and agreed that:

1. The "Stipulation Relative to Exhibits, Etc.," heretofore entered into by and between the attorneys for the parties and intervenors in Suit No. 14603, now pending before the above Court, a conformed copy of which is attached hereto, shall be considered to have been made by and between the attorneys for the parties in this suit, No. 14871, and be

binding herein except that for the purposes of this suit only:

- (a) The material in subparagraphs (a), (b) and (c) of Paragraph 4 of such Stipulation, and the material of Paragraph 7 of such Stipulation shall be and is hereby deleted, and
- (b) The "Schedule" in such Stipulation is deleted and the following is substituted therefor:

SCHEDULE

Exhibit No.	Defendant's Documents
	<i>Description of Documents</i>

- 1 Letter Order for Facilities, dated February 27, 1951, signed "The United States of America by George W. Patterson, Contracting Officer," addressed to Continental Motors Corporation and the latter's acceptance thereof, dated March 1, 1951, comprising a document known as "Contract No. DA-20-018-ORD-11272."

OBJECTION: The exhibit is irrelevant and immaterial.

- 2 Supplement No. 2 to the aforesaid "Contract No. DA-20-018-ORD-11272", which supplement is dated as of April 28, 1951.

OBJECTION: The exhibit is irrelevant and immaterial.

- 3 Supplement No. 7 to the aforesaid "Contract No. DA-20-018-ORD-11272", which supplement is dated as of June 30, 1952.

OBJECTION: The exhibit is irrelevant and immaterial.

- 4 Contract No. DA-20-018-ORD-13262, made as of October 26, 1953, between The United States of

America and Continental Motors Corporation, excepting, however, the "Schedule" mentioned in Section 2 of "Schedule B" to such contract.

OBJECTION: The exhibit is irrelevant and immaterial.

- 5 The first two pages of the "Schedule" referred to in Section 2 of "Schedule B" to the contract, which is **Exhibit 4** above.

OBJECTION: The exhibit is irrelevant and immaterial.

- 6 That portion of the 1954 tax rolls of Muskegon Township pertaining to the taxes involved in this proceeding.
- 7 A tax bill from the Muskegon Township Treasurer's Office, addressed to Continental Motors Corporation, pertaining to taxes assessed upon property in the Township of Muskegon for the year 1954, having a valuation of \$3,000,000.00.
- 8 A tax bill from the Muskegon Township Treasurer's Office, addressed to Continental Motors Corporation, pertaining to taxes assessed upon property in the Township of Muskegon for the year 1954, having a valuation of \$5,200.00.
- 9 The protest letter, dated March 5, 1954, written by Continental Motors Corporation to the Board of Review for the Township of Muskegon and the receipt at the foot thereof signed by Floyd M. Parslow, Chairman.

OBJECTION: The exhibit is irrelevant and immaterial.

10. The letter of April 17, 1954, written by Continental Motors Corporation to the State Tax Commission complaining of an assessment.

OBJECTION: The exhibit is irrelevant and immaterial.

11. The letter of April 20, 1954, written by the Secretary of the State Tax Commission to Floyd M. Parslow, Supervisor of Muskegon Township, Muskegon County, acknowledging receipt of a complaint.

OBJECTION: The exhibit is irrelevant and immaterial.

12. The letter of November 1, 1954 from the Secretary of the State Tax Commission to the Treasurer of Continental Motors Corporation, denying the appeal because it was believed it was not a function of the Commission to rule on the validity or invalidity of a legislative act.

OBJECTION: The exhibit is irrelevant and immaterial.

Plaintiff's Documents

- A. House Bill No. 46 and portions of the journals of the House and Senate—1953 session.

2. Any party to this proceeding may refer to the Armed Services Procurement Regulations and the House and Senate Journals of the Michigan legislature, pertaining to Act No. 189 of the Public Acts of 1953, and it shall not be necessary to introduce any thereof into the evidence, but any items therein referred to by the attorney for a party or any intervenor herein shall be considered to have been offered and received into evidence. Any party who refers

to such regulations or journals shall deliver a true copy thereof to the party who shall demand the same and such delivery shall be made as soon as possible after receipt of such demand.

3. The supervisor of Muskegon Township, Muskegon County, Michigan, made an assessment of all of the real property in his township liable to taxation on tax day, i.e. January 1, 1954, at the true cash value, as required of him under Section 7.27 M.S.A.

In addition, pursuant to Act No. 189 of the Public Acts of 1953 (M.S.A. 7.7[5]), the supervisor also valued as of that date the real property described in the above mentioned tax bills precisely as he would have done had such real property been owned in fee simple and occupied by Continental Motors Corporation; that he valued such real property at the true cash value of the fee simple ownership on the basis defined in Section 7.27 M.S.A.; giving consideration to the advantages and disadvantages enumerated in such Section; that the valuation of the real estate thus determined was \$3,000,000.00 for the parcel described in Exhibit 7 above and \$5,200.00 for the parcel described in Exhibit 8 above, and such valuations were accordingly set down upon the tax rolls of such township opposite the description of the parcel to which they pertained and the aforesaid tax bills were thereafter issued by the Treasurer's office of the said Township to the defendant herein; that the parcels of real property described in such tax bills were not assessed to the occupant thereof pursuant to Section 7.3, M.S.A., and that the said supervisor did not determine as of January 1, 1954 the cash value of nor did he ever separately value the right to use and occupy such parcels granted to the defendant, Continental Motors Corporation, by The United States of America.

Continental Motors Corporation was assessed as provided

in said Act No. 189, in the same manner, amount and to the same extent as though Continental Motors Corporation had been the owner of the property.

4. The property tax on real property in the Township of Muskegon for 1953 was \$36.74 per \$1000 of assessed valuation and in 1954 was \$27.94 per \$1000 of assessed valuation.

5. The plant in question was used by Continental Motors in 1953 and 1954 exclusively for the production of materiel as provided in the Agreement from the United States for its occupancy, Exhibits 1, 2, 3 and 4 (referred to above) and all supplements to any of the foregoing.

6. That Continental Motors Corporation is organized and conducted for the purpose of making a profit; that operations at the Getty Street plant are a part of the corporation's operations; Continental also operates plants in Muskegon, Michigan known as Market Street Plant; in Detroit, Michigan at its Kercheval Street Plant, and through subsidiaries such as Wisconsin Motors and Gray Marine Motors Company; that for the year 1953 Continental had overall consolidated net earnings after payment of taxes of \$6,023,812.00 and consolidated net earnings of \$4,542,748.00 after payment of taxes in 1954; that for security reasons it is not considered desirable to make a break down as to the volume of production or profits derived from the Getty Street Plant; it is admitted however, that the Getty Street Plant was used by Continental in connection with its business conducted for profit and that a profit was derived from such operations.

All of the material contained in paragraph 3 and 5 above shall be considered to have been testified to in Court, subject to the objections of the plaintiffs and paragraph 6 above subject to the objection of the defendant that such material is not relevant nor material.

Dated this 15th day of February, A.D. 1955.

Joseph T. Riley

715 Hackley Union National Bank Bldg.
Muskegon, Michigan, and

BUTZEL, EAMAN, LONG, GUST
& KENNEDY

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(Attorneys for the Defendant,
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CORPORATION)

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(Attorneys for Plaintiff, ORCHARD
VIEW RURAL AGRICULTURAL
SCHOOL DISTRICT NO. 5,
MUSKEGON TOWNSHIP,
MUSKEGON COUNTY, MICHIGAN)

Wendell A. Miles
Grand Rapids, Michigan
by Robert J. Danhof, Asst. U.S. Atty.
(Attorney for Intervenor, THE
UNITED STATES OF AMERICA)

**STIPULATION RELATIVE TO EXHIBITS, ETC.,
ATTACHED TO STIPULATION OF
FEBRUARY 15, 1955
(Filed In Open Court February 16, 1955)**

It is hereby stipulated and agreed that:

1. A certain manufacturing plant, which on January 1, 1953 was located upon those parcels of land located in Muskegon Township, Muskegon County, Michigan, described in Exhibit 18 in the "Schedule" hereinafter mentioned, was constructed for Defense Plant Corporation; that the money required to construct such plant was disbursed by or on behalf of Defense Plant Corporation and was obtained by borrowings made by Defense Plant Corporation from Reconstruction Finance Corporation; that Reconstruction Finance Corporation in turn borrowed the money from the United States Treasury; that all borrowings above-mentioned were evidenced by notes; and that the notes issued to the Secretary of the Treasury by Reconstruction Finance Corporation evidencing the loans made in the performance of its national defense, war and reconversion activities (which included the activities performed by Defense Plant Corporation) were cancelled by the Secretary of the Treasury in accordance with the Government Corporations Appropriation Act of 1949 (P.L. 860—80th Congress).

(a) All of the above material shall be considered to have been testified to in Court, subject to the objections of the defendant that such material is not relevant nor material.

2. All Courts shall take judicial notice of the Acts of Congress, proclamations and executive orders of the President of the United States and of all Plans of Reorganization, regulations and all other material published in the Federal Register; and it shall not be necessary to introduce any of the foregoing into the evidence but all such items at any time referred to by any attorney for a party or intervenor herein shall be considered to have been offered and received into evidence. Any party or intervenor who refers to any of the foregoing items shall deliver a true copy thereof to the party or intervenor who shall demand the same and such delivery shall be made as soon as possible after receipt of such demand.

3. (a) Each document, or a copy thereof, described in the "Schedule" hereinafter set forth, as to which there is no objection specified beneath the description of such document in such "Schedule", may be offered and, if offered, shall be received into the evidence without objection.

(b) Each document, or a copy thereof, described in such "Schedule" as to which there is one or more objections specified beneath the description of such document in such "Schedule", may be offered into the evidence and, if offered, no counsel shall object to the receipt of such document into the evidence on any ground not specified in this stipulation with respect to such document; and, unless at least one specified objection is made and sustained, such document shall be received into evidence if it has been offered.

(c) Signed originals or duplicate copies of such documents need not be offered. It shall be sufficient that the copy offered is a photostatic copy thereof or has been conformed to the original, and it shall be presumed that such

copy has been so conformed unless a written demand shall be made upon counsel for plaintiff or defendant, as the case may be, to produce at the trial either the original or a signed duplicate copy and such demand is served not less than three (3) weeks prior to the commencement of the trial of this cause.

4. It shall be presumed, unless proof to the contrary shall be received, that (i) the person or persons whose names appear as signatory upon any document or part thereof described in such "Schedule" actually signed the original and was authorized so to do; (ii) all letters described in such "Schedule", together with the enclosures, if any, mentioned therein, were promptly delivered to their addressees; (iii) all deeds, agreements, permits, acceptances, contracts, leases, and supplements to contracts or leases, described in such "Schedule", were delivered to the grantees or parties thereto when they were signed; (iv) the Declaration of Surplus Real Property and Amended Copy thereof, described in such "Schedule", were delivered to the Chairman of the Board of the War Assets Corporation and to the War Assets Administrator, respectively; (v) the tax bills described in such "Schedule" were issued by defendant and received by those whose time stamp appears thereon; (vi) the portion of the 1953 tax rolls, described in such "Schedule", is a true copy of that portion of the original tax rolls which it purports to be; and (vii) the minutes, described in such "Schedule", are true copies of the originals; and

(a) If Exhibit B is received into evidence, it shall be considered that Ada L. Weisenberger did testify upon direct examination by defendant that the items described in such certificate were true;

(b) If Exhibit C is received into evidence, it shall be considered that Andy J. Tatrow did testify upon direct

examination by defendant that the items contained in such Exhibit were true; and

(c) If Exhibit G is received into evidence, it shall be considered that Floyd Parslow did testify upon direct examination by defendant that the items contained in such Exhibit were true.

5. Whenever the original or a copy of any one of the documents described in such "Schedule" shall be offered in evidence, it shall be marked as an Exhibit bearing the number or letter appearing to the left of the description of such document in such "Schedule".

6. Either party, or any intervenor, may offer additional testimony at the trial of the above cause not in conflict with the stipulation of facts contained in paragraphs one and seven hereof.

7. The \$139,225.34 paid by plaintiff under protest to the Muskegon Township Treasurer on February 26, 1954, for which such Treasurer delivered to the plaintiff two receipts, a photostatic copy of each of which is attached to the pleadings in this cause, was disbursed by the said Treasurer on or about the first day of August, 1954 as follows: \$101,641.77 to the Orchard View Rural Agricultural School District No. 5, being one of the intervening defendants herein; \$12,179.21 to the defendant, Muskegon Township, and \$24,284.44 to the County of Muskegon, one of the intervening defendants herein. The funds disbursed to the Township of Muskegon and the County of Muskegon went into the Township and County General Funds. Of the funds disbursed to the said School District, \$30,541.25 went into the said School District's General Operating Funds and \$71,100.52 into the said School District's Debt Retirement Fund to apply on the said District's bonded indebtedness. The aforesaid disbursement, by the Muskegon Township

Treasurer, was made pursuant to an express demand for disbursements made by said School District on July 20, 1954.

SCHEDULE

Exhibit	Plaintiff's Documents
No.	<i>Description of Document</i>

- 1 Deed dated October 18, 1943 from Continental Aviation and Engineering Corporation to Defense Plant Corporation, recorded October 20, 1943 in Liber 457 of Deeds at page 181 in the Office of the Register of Deeds for Muskegon County, Michigan.
- 2 Deed dated April 4, 1945 from Continental Aviation and Engineering Corporation to Defense Plant Corporation, recorded April 19, 1945 in Liber 485 of Deeds at page 282 in the Office of the Register of Deeds for Muskegon County, Michigan.
- 3 Agreement of Lease dated as of June 9, 1942 between Defense Plant Corporation and Continental Aviation and Engineering Corporation, together with supplements thereto, dated October 4, 1942, May 18, 1943 and December 10, 1943.

OBJECTION: The exhibit is irrelevant and immaterial.

- 4 An excerpt from the minutes of a meeting of the Executive Committee of the Reconstruction Finance Corporation of March 12, 1946, as certified by the Secretary of Reconstruction Finance Corporation on June 30, 1954.

OBJECTION: The exhibit is irrelevant and immaterial.

- 5 A copy of the By-Laws of Reconstruction Finance Corporation in effect on March 12, 1946 as certified

by the Secretary of Reconstruction Finance Corporation on October 12, 1954.

OBJECTION: The exhibit is irrelevant and immaterial.

- 6 An excerpt from the minutes of a meeting of the Board of Directors of the Reconstruction Finance Corporation held March 13, 1946, as certified by the Secretary of Reconstruction Finance Corporation on October 21, 1954.

OBJECTION: The exhibit is irrelevant and immaterial.

- 7 Form SPB-5, pertaining to Plancor 166, entitled "Declaration of Surplus Real Property" made by the Reconstruction Finance Corporation on or about March 20, 1946.

OBJECTION: The exhibit is irrelevant and immaterial.

- 8 Letter pertaining to Plancor 166 dated March 20, 1946 from William J. Hickey of Reconstruction Finance Corporation to E. B. Gregory, Chairman, War Assets Corporation.

OBJECTION: The exhibit is irrelevant and immaterial.

- 9 Letter pertaining to Plancor 166M dated May 27, 1948 from War Assets Administration to Reconstruction Finance Corporation, together with the sheet marked "Exhibit A" dated May 21, 1948 entitled "Acknowledgment of Transfer of Accountability" mentioned in such letter, excepting the two lists attached to the Exhibit, which lists refer to personal property.

OBJECTION: The exhibit is irrelevant and immaterial.

- 10 WAA Form 1005 pertaining to Plancor 166, being a Declaration of Surplus Real Property entitled "Amended Copy," dated August 27, 1948, signed by F. F. Nelson, Assistant Manager of Reconstruction Finance Corporation.

OBJECTION: The exhibit is irrelevant and immaterial.

- 11 Undated letter pertaining to Plancor 166M from War Assets Administration to Reconstruction Finance Corporation, together with the sheet marked "Exhibit A", dated September 14, 1948, titled "Acknowledgment of Transfer of Accountability".

OBJECTION: The exhibit is irrelevant and immaterial.

- 12 Lease made as of April 1, 1949 between Reconstruction Finance Corporation and Continental Motors Corporation and "Surrender of Lease" dated as of November 1, 1950, made by and between the same parties, both of which instruments relate to Plancor 166M.

OBJECTION: The exhibit is irrelevant and immaterial.

- 13 Letter agreement dated September 18, 1950 pertaining to an "interim permit" from General Services Administration to the Department of the Army, Ordnance Corps, with respect to Plancor 166M, together with material appearing beneath the signature on such letter through and including the words "Department of the Army Ordnance Corps by James G. Sipe, Contracting Officer."

OBJECTION: The exhibit is irrelevant and immaterial.

- 14 Letter Order for Facilities dated February 27, 1951 signed "The United States of America by George W. Patterson, Contracting Officer", addressed to Continental Motors Corporation, and the latter's acceptance thereof dated March 1, 1951, comprising a document known as "Contract No. DA-20-018-ORD-11272".

OBJECTION: The exhibit is irrelevant and immaterial.

- 15 Supplement No. 2 to the aforesaid "Contract No. DA-20-018-ORD-11272", which supplement is dated as of April 28, 1951.

OBJECTION: The exhibit is irrelevant and immaterial.

- 16 Supplement No. 7 to the aforesaid "Contract No. DA-20-018-ORD-11272", which supplement is dated as of June 30, 1952.

OBJECTION: The exhibit is irrelevant and immaterial.

- 17 Letter pertaining to Plancor 166 dated December 18, 1952 from William R. Smith, Major, Ordnance Corps, to Continental Motors Corporation.

OBJECTION: The exhibit is irrelevant and immaterial.

- 18 The portion of the 1953 tax rolls of Muskegon Township pertaining to the taxes involved in this proceedings.

OBJECTION: The exhibit is irrelevant and immaterial.

- 19 Letter dated November 14, 1953 from Street & Sorenson to Continental Motors Corporation, relative to school taxes on the Getty Street Plant.

OBJECTION: The exhibit is irrelevant and immaterial.

- 20 Letter dated December 3, 1953 from Street & Sorenson to Butzel, Eaman, Long, Gust & Kennedy, relative to school taxes on the Getty Street Plant.

OBJECTION: The exhibit is irrelevant and immaterial.

- 21 Two tax bills from Muskegon Township Treasurer's Office, received by General Services Administration, pertaining to the taxes involved in this proceeding.

- 22 A tax bill from the Muskegon Township Treasurer's Office for the year 1953 for the total amount of \$143,360.76, addressed to War Assets Administration and marked "duplicate" and "Paid under Protest, Arthur DeBaker, Treasurer".

- 23 A tax bill from the Muskegon Township Treasurer's Office for the year 1953 for the total amount of \$269.51, addressed to War Assets Administration and marked "duplicate" and "Paid under Protest, Arthur DeBaker, Treasurer".

- 24 Letter of protest dated February 26, 1954, addressed to Arthur DeBaker, Treasurer of Muskegon Township, by Continental Motors Corporation, including the acknowledgment at the foot thereof signed by Mr. DeBaker as Treasurer of Muskegon Township.

Defendant's Documents

- A Quit claim deed dated May 6, 1953 from the Reconstruction Finance Corporation to the United States of America, recorded December 9, 1953 in Liber

631, pages 351-356 in the Office of the Register of Deeds for Muskegon County, Michigan.

OBJECTION: The exhibit is irrelevant and immaterial.

- B Certificate of Ada L. Weisenberger, Chief Clerk, Muskegon County Treasurer's Office, dated September 27, 1954 relative to taxes assessed in respect to a parcel of land designated as "MU 465" for the years 1943 through 1952, together with an attached metes and bounds description of said "MU 465" signed by the above affiant.

OBJECTION: The material contained in such certificate is irrelevant and immaterial, and has no bearing upon the issues in this cause.

- C Affidavit of Andy J. Tatrow, dated August 7, 1954
(i) as to what the records of Orchard View Rural Agricultural School, District No. 5, show as to student enrollment for the years 1940-41 through 1953-54, and (ii) as to what a census taken November 23, 1953 shows as to the number of children attending such school who had parents who were employed by the Continental Aviation Plant.

OBJECTIONS: The material contained in such affidavit is irrelevant, immaterial and has no bearing upon the issues in this cause, but is presented for the purpose of influencing the decision herein on the basis of purely equitable considerations. Such a material has absolutely no bearing upon the legal issues presented by this action for determination.

- D A copy of a portion of the minutes of a special meeting of the Board of Education, Orchard View School, District #5, Township of Muskegon, Mus-

kegon County, Michigan, held on the 30th day of December, 1952, as certified on such date by Andy J. Tatrow, Secretary of such Board.

OBJECTIONS: The material contained in the preambles and resolutions comprising such minutes is irrelevant, immaterial and has no bearing upon the issues in this cause. The preambles are self-serving and the allegations of fact therein set forth have not been proven by competent testimony. The preambles contain conclusions of law which are deemed to be inaccurate and relate to matters which are in issue and must be judicially determined herein.

F A copy of the minutes, pertaining to the acceptance of a bid for bonds, of a special meeting of the Board of Education of School District No. 5, Township of Muskegon, Muskegon County, Michigan, held on the 20th day of January, 1953, as certified by Andy J. Tatrow, Secretary of such Board, on such date.

OBJECTIONS: The material contained in the preambles and resolutions comprising such minutes is irrelevant, immaterial and has no bearing upon the issues in this cause. The preambles are self-serving and the allegations of fact therein set forth have not been proven by competent testimony.

F Letter dated September 18, 1952 from Joseph A. Burke, Real Property Disposal Officer, Public Buildings Services to Street & Sorensen, relating to Plancor 166.

OBJECTIONS: The letter is self-serving. It is irrelevant, immaterial and has no bearing upon the issues in this cause. The second paragraph of

the letter contains conclusions of law and inferences to be drawn therefrom which are deemed to be inaccurate and to relate to matters which are in issue and must be judicially determined herein. The writer of the letter was not the agent of plaintiff at the time the letter was written and plaintiff is not bound by such letter nor anything therein.

G Affidavit of Floyd Parslow, dated December 29, 1954, pertaining to the total assessed valuation of all property in School District #5 as of January 1, 1953 and the assessed valuation as of such date of the so-called Getty Street Plant.

OBJECTION: The material contained in such affidavit with respect to the total assessed valuation of all property is irrelevant and immaterial and has no bearing upon the issues in this case.

Joseph T. Riley
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 Muskegon, Michigan, and
**BUTZEL, EAMAN, LONG, GUST
 & KENNEDY**

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Agricultural School District No. 5,
Muskegon Township, Muskegon County,
Michigan)

Wendell A. Miles
Grand Rapids, Michigan
(Attorney for the United States of
America)

TRANSCRIPT OF TESTIMONY:

The above cause came on for trial before the Honorable RAYMOND L. SMITH, Presiding, on the 16th day of February, 1957. The appearances were as follows:

Messrs. VICTOR W. KLEIN and CLIFFORD W. VAN BLARCOM, of the firm of Butzel, Eaman, Long, Gust & Kennedy, of Detroit, Michigan, and JOSEPH T. RILEY, of Muskegon, Michigan, appearing on behalf of the Plaintiff;

Messrs. LYLE W. TURNER, of Washington, D. C. and ROBERT J. DANHOF, of Grand Rapids, Michigan, they being respectively a Special Assistant to the Assistant United States Attorney General and Assistant United States Attorney for the Western District of Michigan, appearing on behalf of the Intervening Plaintiff, the United States of America;

Mr. CHARLES A. LARNARD, of Muskegon, Michigan, appearing on behalf of the Defendant, the Township of Muskegon;

Mr. HAROLD M. STREET, of Muskegon, Michigan, of the firm of Street & Sorensen, appearing on behalf of Orchard View Rural Agricultural School District No. 5, one of the Intervening Defendants; and

Mr. ROBERT A. CAVANAUGH and his assistant, Mr. WILLIAM P. SPANIOLA, both of Muskegon, Michigan, they being respectively the Prosecuting Attorney and Assistant Prosecuting Attorney for the County of Muskegon, appearing on behalf of such County, one of the Intervening Defendants.

Prior to the opening of the trial, the parties and intervenors, by their attorneys, had entered into a Stipulation dated February 15, 1955, set forth above. No witnesses were presented by either party or any intervenor at the trial; but, having entered into the aforesaid stipulation, the following proceedings took place at such trial:

Mr. Street: May it please the Court, this is a similar case, with the parties reversed. This is a suit by the Township of Muskegon and Orchard View School and the County, all joining in a suit against Continental Motors Corporation to recover taxes assessed for the year 1954. The taxes were assessed under what is sometimes referred to as the 'Austin Bill,' an Act which provided for the taxation of lessees and users of tax-exempt property.

The Bill is very short and simple. It simply provides that where property, which is for any reason tax exempt, is leased, loaned or otherwise made available to any individual, association or corporation engaged in business for profit, and if the property is used in connection with that business for profit, then the lessee or user shall be taxable.

in the same amount and in the same manner, and to the same extent as though the lessee or user were the owner of the property.

Tax was assessed under that Act and not paid. The Act further provided that the taxes, when due, would be recoverable through an action of assumpsit by any of the units of government entitled to the tax. So this suit was started.

I believe the only defense made is that the Act is unconstitutional.

That, I believe, summarizes our position.

Mr. Van Blarcom: I'll just make a very brief opening statement because this case will be argued by Mr. Klein. But I would like to say for the record that the facts of this case are very much like those in the case we concluded this morning (i.e. Muskegon Circuit Court Law Case #14603), with the exception that such title, if any, as RFC may have had in the property was transferred in the summer of 1953 by a deed, a quit-claim in nature, to the United States of America. And that deed was placed of record with the Register of Deeds of this County in December of 1953, prior to tax date, which was January 1, 1954.

One other additional fact, in the spring of 1954, the Facilities Contract that had been in existence between the United States of America and Continental Motors, to which reference was made in the 1953 case, was changed and a new contract was made, which will be offered into evidence in this cause, which was retroactive in nature, dating back to October of 1953.

One additional fact more. I understand that the assessment in this case is claimed to have been made under Act 189 of Public Acts of 1953 and not as it was made in the 1953 case which we concluded this morning.

With those few changes, we have very much the same facts as we had in the earlier case this morning.

And Mr. Klein will talk about a number of things, I am sure. You point out to the Court that we think the Act is inapplicable to the facts as we know them; and secondly, if it is applicable to the facts as we know them, the Act is unconstitutional for a variety of reasons.

As the files of the Court will show, this case was started just this month. And yesterday afternoon counsel for all parties reached an agreement which was reduced to writing and signed, and I have that here for the Court's use and I'd like to file it. It's the stipulation pertaining to all of our exhibits in this case, including those from the other, plaintiff's side of the case.

Mr. Klein: And certain other facts.

Mr. Van Blarcom: And certain other facts, of course. I hand it to the Court at this time so that you will have it during the argument.

Mr. Riley: And the court reporter—

Mr. Van Blarcom: Yes. Mr. Riley properly calls to my attention that the court reporter, yesterday afternoon, as he did in the 1953 case, also marked all the exhibits in this case. So I think we are ready to put the exhibits in at this time, Mr. Street.

Mr. Street: Yes. The Plaintiff only has the one. You will notice that in the stipulation we had the parties reversed. We still think of each other as on the other side of the case. You will find Plaintiff's Exhibit at the end and there is only the one, which is a copy of Act 189, which originated in House Bill 46, and the copy of the House and Senate Journal entries made relative to that Bill in the course of its amendments and ultimate passage. It would be a matter of judicial notice probably, anyway, but we

feel it is better that we have before the Court the complete record. So we offer in evidence the record of the Journal entries of the House and Senate.

Mr. Van Blarcom: Did you have any further proof to put in, Mr. Street?

Mr. Street: No

Mr. Van Blarcom: Well,—

The Court: Just a moment.

Mr. Van Blarcom: Yes, surely.

The Court: You have handed up two stipulations, one in this morning's case too. I felt that this is a copy.

Mr. Van Blarcom: Yes. It is a conformed copy. There is some, you see, the case, the stipulation.

The Court: Oh, I see. That's to be filed in the file.

Mr. Van Blarcom: Yes, it's to be filed.

Mr. Klein: There are some differences.

The Court: In reference to this morning's case.

Mr. Van Blarcom: I beg your pardon.

The Courts: I may be mistaken, but I don't believe the file has the original stipulation in it. I was given a photostat, and I have taken the liberty of making certain notations on it for my own purposes because it wasn't signed by anybody; and I assumed I would have that privilege.

Mr. Van Blarcom: Well, you certainly should have had a signed copy in the file. Now does the record of the Court, the calendar, show that it has been filed or don't we know?

The Court: So many stipulations.

Mr. Riley: I personally filed it, quite some time ago.

Mr. Larnard: It might not be calendared yet.

Mr. Riley: Oh, it has been here so long. It should have been calendared weeks ago. You remember, Charley, when you and my girl come over and got them.

Mr. Larnard: Yes. That is a couple of weeks ago.

Mr. Riley: All right. They were filed that same day.

The Court: Well, I'll be glad to let you look through the file and see if you can find it.

Mr. Van Blarcom: I am sure that it is not there if you say it is not there.

Mr. Riley: We don't question that, your Honor, but the trouble is we filed it.

Mr. Van Blarcom: Well, would it help, your Honor, if we gave you our signed copy? We will take it out of our folder and give it to you.

The Court: I am just thinking about the record in the case. This was in the file, and it is only a photostatic copy. I think it is a photostat.

Mr. Street: I believe it is here, your Honor, the last entry, stipulation relative to exhibits.

Mr. Riley: Here, we will give him one that is filed.

The Court: It is part of the pre-trial proceedings.

Mr. Street: Yes, right after the pre-trial transcript.

Mr. Riley: No, that wasn't part of the pre-trial.

Mr. Street: No, but I believe it was filed in the file following the pre-trial transcript.

The Court: This was never calendared. This is part of the pre-trial.

Mr. Street: Oh, that is what happened. They simply calendared it as part of the pre-trial.

Mr. Riley: They shouldn't have done that.

Mr. Klein: May we stipulate that that should be part of the record in some way, or should we have to enter in the calendar?

The Court: If you are worried about it, you can stipulate it.

Mr. Street: That is agreeable.

Mr. Van Blarcom: Well, we will stipulate that the stipulation relative to exhibits, etc., in the case which we tried this morning will be considered, and which is now in the file as a part of the pre-trial proceedings, shall be considered as having been calendared and to be a part of the record of the Court. Is that satisfactory?

Mr. Street: Yes.

Mr. Van Blarcom: Thank you. Now are we ready to go back?

Mr. Klein: That is in the '53 case.

Mr. Van Blarcom: Yes, that is in the '53 case.

Mr. Van Blarcom: And the case number, for the sake of the record, is 14603.

Now, with reference to Case No. 14871, which pertains to the 1954 taxes. I'd like at this time to begin the introduction of the Defendant's exhibits. The first exhibits to be offered are numbers 1, 2 and 3. No. 1 is the letter of contract between the United States of America and Continental Motors, dated February 27, 1951. No. 2 is the definitive contract based upon the letter contract, that being the definitive contract between the United States of America and Con-

tinental Motors Corporation, entered into as of April 28, 1951. The third exhibit is supplement No. 7 to the definitive contract entered into between the United States of America and Continental Motors Corporation as of the 30th of June, 1952. Those were introduced into the record this morning with reference to the 1953 case. They are the Facilities Contract, which portions of it that we deemed material, which were in existence on tax date January 1, 1954, and they are introduced into the evidence, or, I am offering into the evidence at this time.

Mr. Street: We want to register a pretty strong objection to that. I think it should be ruled as inadmissible. We are dealing here with a Statute, your Honor, which provides that the lessee or user of tax-exempt property, where the property is used in connection with the business for profit, shall be taxable. Now, these exhibits, apparently, are an effort to show the nature of the use which is wholly irrelevant under the Statute. And you will notice in our reply we asked that that portion of the pleadings be stricken as irrelevant to the case.

Mr. Klein: If the Court please, the very issue here before the Court is the question of the use of Continental Motors, under certain contracts, the power of the State to tax that use and right to use it. And we are introducing these exhibits into evidence for two purposes, number one, to show the agreement from the United States to Continental permitting the use to it. That is the use which is here being subjected, or, the plaintiffs' claim can be subjected, to a tax. Furthermore, in those documents appears the limitations of use limitations, if you please, whereby the United States, the owner of this other which is immune property, specifying very carefully that Continental may only use the United States property for the manufacture of defense goods for the United States, and may not, in charging the

priee of those goods made, make any charge for the use or rental or occupancy of this building which it gets without any payment to the United States. Both of those questions are material in considering the question before your Honor, in view of arguments which I know the tax authorities will make. I think it bears upon the ultimate issue and are essential to have before the Court.

The Court: The Court will overrule the objection and receive Defendant's Exhibit 1, 2 and 3.

Mr. Van Blarcom: I now wish to offer into evidence those exhibits marked 4 and 5. Exhibit 4 is the Facilities Contract between the United States of America and Continental Motors Corporation, which was signed in May of 1954, some five and a half months after tax date in this case, but made as of October 26, 1953. Mentioned in the contract, Exhibit 4, is a schedule of Government-furnished property. That schedule consists of three hundred odd pages of personal property which is not the subject of this litigation, and two pages of description pertaining to the real property, namely, the plant here involved. And that description of the property, the real property, is Exhibit No. 5.

Now the declaration filed in this litigation speaks of our right to use the property during the whole of 1954, and because of that allegation I offer these two exhibits, 4 and 5, at this time.

Mr. Street: We make the same objection.

Mr. Larnard: The same objection, your Honor.

Mr. Klein: Addressing ourselves to that objection, in addition to the points we made; we think that the plaintiffs' allegations are without merit in its declaration. In other words, we take the position that the assessment must be determined as of the situation as it existed on tax assess-

ment date. And we say the Court should not consider the allegation in the declaration. And if it doesn't, this exhibit becomes of no importance. But, since we know that that is in the declaration, subject to that position, we say here, your Honor, is a contract, in effect, as to the use during the balance of the year which had the same limitations as to use solely for the making of defense material, not otherwise, and no charge to the Government for the occupancy. We say the declaration shouldn't have made that allegation, and if the Court sustains us on that, this exhibit is unimportant. If the Court wishes to consider it, then we offer this proof to negative any merit to that phase of it.

Mr. Street: Of course, if that allegation that they occupied it throughout the year 1954 is immaterial then, of course, this is immaterial too. This thing of the equity is getting on the other foot now. We were accused of appealing to the Court's equity this morning. Now it is the other way around. Defendant in this case admits in their answer that they occupied the land throughout the year 1954, and that they occupied it for use in connection with their business conducted for profit. And that is the only thing at issue under the Statute. They become taxable.

Now, we feel that this is all immaterial. They admit in their pleadings they occupied the land all year around and that they used it in connection with business profits.

Mr. Klein: Admits an allegation we say has no basis. Having admitted it, as we would be confronted, we offer the proof. Furthermore, we are not claiming this on any equity side. We contend that one of the phases of the argument as to the validity of this tax will involve the question of use of Government property solely for the purpose of making Government defense material, which is provided for under the Federal Constitution. And we say it is beyond

the power of a state to impose any kind of a tax on that kind of a use and on that kind of property, so we say it is material. We are not appealing to the equity of the Court. We are appealing to the Court on the pure question of constitutional law.

The Court: Well, I am inclined to receive the exhibits. It makes no difference whether the Court qualifies it subject to the objection. The objection is on the record. Four and five will be received.

Mr. Van Blarcom: I'd like at this time, your Honor, to offer Exhibit 6, to which there is no objection by the plaintiffs. This is a photostatic copy of the tax roll, Sheet No. 80. It shows a description of the two pieces of property involved. It shows that the one piece was, had a true cash value, as assessed, of \$5200.00 of true cash value. It is fixed by the Board of Review, of \$5200.00. And shows with respect to the larger piece that it had a true cash value as real property of \$3,000,000.00, and true cash value, as fixed by the Board of Review, of real property at \$3,000,000.00. I'd like to offer that at this time.

Mr. Street: No objection.

Mr. Van Blarcom: As I understand it, gentlemen, this came out of the general property ad valorem tax rolls.

Mr. Larnard: That is right. And I might say that this should be, this is all one, all one record. It goes like that. It is all page 80. I think that is what you want.

Mr. Van Blarcom: Yes.

Mr. Larnard: It is an extension of the tax.

Mr. Van Blarcom: Yes. Well, we will consider Exhibit 6 as one exhibit and consisting of two sheets, both bearing Sheet No. 80. All right.

I think, if you will please, Mr. Reporter, you had better

mark this in some way as part of the Exhibit 6. Would you?

(Received and marked the second sheet of Exhibit 6 as requested.)

Mr. Van Blarcom: Exhibit 7, your Honor, is a tax bill to which there is no objection. It covers the larger piece, having a valuation of \$3,000,000.00, for the year 1954, showing a tax of \$83,820.00, with a collection fee on top of that. It runs to Continental Motors Corporation, although I also see on it Continental Motors Corporation and/or occupants.

The Court: It will be received.

Mr. Van Blarcom: Exhibit No. 8 is the tax bill for 1954 on the smaller of the two pieces, having a valuation of \$5200.00, a tax total of \$231.76, plus collection charge. And, as in the former instance, the bill runs to Continental Motors Corporation and then there is a notation, Continental Motors Corporation and/or Occupants. There is no objection to this bill.

The Court: It will be received.

Mr. Van Blarcom: This is the same type of bill, is it not, gentlemen, that was sent to all owners of real estate in the Township?

Mr. Larnard: That is correct.

Mr. Van Blarcom: No. 9, to which there is an objection, is the protest letter written by Continental Motors, signed by Mr. Vandeven, directed to the Board of Review for the Township of Muskegon, dated March 5, 1954, with the receipt thereon by Mr. Parslow, Chairman of the Board of Review, acknowledging receipt of the protest. That protest was delivered at the time of the meeting of the Board of Review. We were, in this instance, protesting the tax. I offer that into the evidence at this time.

Mr. Street: Our only objection to that, your Honor, was that the same thing is attached to the pleadings and we admitted it, and so it is merely cumulative. It makes no difference whether it goes in as an exhibit or not.

The Court: Received.

Mr. Van Blarcom: No. 10 is a letter of April 17, 1954, by Continental Motors Corporation, signed by Mr. Vandeven, addressed to the State Tax Commission, complaining of the assessment. I offer that into the evidence at this time. There is an objection to it.

Mr. Street: Our objection, again, it was purely cumulative. It is admitted in the pleadings that they did object before the Board of Review, that they did take an appeal, that the State Tax Commission denied the appeal. Although it is admitted in the pleadings, it does no harm.

Mr. Van Blarcom: I think it is nice to show it on the record.

The Court: It will be received.

Mr. Van Blarcom: Exhibit No. 11 is a letter from Mr. Kane, Secretary of the State Tax Commission, addressed to Mr. Parslow, Supervisor of Muskegon Township, acknowledging receipt of the complaint. There is an objection to this letter as well.

The Court: Probably the same objection.

Mr. Street: Yes.

The Court: All right. It will be received.

Mr. Van Blarcom: Exhibit 12, which is the last exhibit to be offered, is the final determination of the State Tax Commission. Mr. Kane, as Secretary, and that is K-A-N-E,

Mr. Stenographer, addressed the letter, under date of November 1, 1954, to Mr. Vandeven, Treasurer of the Continental Motors Corporation, in reply. Among other things, he said, "The Commission, therefore, adopted a resolution to deny the appeal of Continental Motors Corporation because it is not a function of the State Tax Commission to rule on the validity or the invalidity of a legislative Act." I'd like to offer that into the evidence at this time. There is an objection.

Mr. Larnard: Same objection.

Mr. Street: Same objection.

The Court: And it will be received.

Mr. Van Blareom: We have no further proof. We have no witnesses. There is material stipulated to which is before the Court now, and Mr. Klein will handle that during the course of his argument.

Mr. Street: If the Court please, Mrs. Holecomb borrowed my notes this morning to get some citations. If I could get them back I would be in a little better position to argue, I believe. You want to take a short recess?

The Court: You just step out and get them.

Mr. Klein: Your Honor, I have gotten a long distance call and I don't know how long it will take.

The Court: We will have a short recess.

Mr. Klein: I'll appreciate it, sir.

(Subsequent to taking a short recess, the following transpired):

Mr. Klein: Thank you very much, sir.

Mr. Street: May it please the Court, I believe the only real issue involved in this case is the constitutionality of

Act 189. There are various claims, among the constitutionality, raised in the pleadings which seem to be more detailed than the brief, even, and apparently as equally argumentative.

The first one I'd like to take up is the claim that the Act is indefinite and uncertain. The Court will notice from the Plaintiffs' Exhibit A that there were some amendments made in the Act, and, unfortunately, the clause "such lessee or users" was, I think, inadvertently omitted in the Senate. The original House Bill read substantially to this effect, if not verbatim, that where property which is for any reason tax exempt is made available to and used by any person, association or corporation in connection with the business for profits, such lessee or user shall be subject to tax.

In the Senate, the Bill was modified and broken down into two sections. In the first section that clause, "such lessee or user," was omitted. As I say, I think it was inadvertently, as the record will show.

However, Section 2 of the Bill makes it clear that it is the lessee or user that is to be taxed. And it provides that he shall be taxed in the same manner, in the same amount, and to the same extent as though the lessee or user were the owner of the property. So, I believe, reading the Bill as a whole, it is perfectly clear that the Tax is upon the lessee or user, and it is perfectly clear from the title of the Bill itself.

We feel there is no merit to the claim that the Bill was uncertain, that there is any uncertainty as to whether it is a tax on the property or it is a tax on the use of the property, the user of the property.

Counsel attempts to make a distinction between the word immune and exempt. As far as I am concerned, the two

words are synonymous and, apparently, the Legislature treated them the same way because you will notice a specific reference in the Act to Federal property. And it says this Act shall not apply to Federal property where payments in lieu of taxes are made in an amount that would otherwise have been assessed to the property, so that it is clear that the Legislature had in mind Federally-owned property. And when they used the term exempt, they were using it as synonymous with the term immune.

Now, one other matter that was raised in the answer, but not in the brief . . . I don't know if counsel intends to abandon it or not . . . was the claim that the Act violates Article 10, Section 6 of the Michigan Constitution. Since it was not briefed, I'll only touch on it in passing. That constitutional provision provides, in substance, that a tax law shall state the object to be taxed, the object to be taxed and the rate of taxation with reference to another tax bill. If not such, or words to that effect.

And we believe this case before the State Tax Commission — I went into the history of that provision quite thoroughly. It appears there by an appendage that held over from an older constitutional provision. And then, in a later revision of the constitution, they required that, in the title of each Act, that it state—in other words, you could only have one Bill under one title. It was designed to prevent the practice that prevailed in the passing of a Bill which, oh, say, was designed to get rid of cattle with hoof and mouth disease and then on page 10 they slip in a tax bill on you.

Well, in view of that change to the Constitution, this old appendage that hung over apparently became meaningless. There have been 11 cases go to the Supreme Court on which it was claimed the Act was unconstitutional on the grounds of Section 10, or, Article 10, Section 6. As far as I

know, our Supreme Court has never held a Bill, an Act, unconstitutional on that ground, and the court has stated the reason for it, that the purpose of that particular clause no longer exists.

The sum and substance of the argument, as I get it from reading, is that this is a tax on property. Now, both before the State Tax Commission and in talking to opposing counsel, I explained repeatedly that this is a tax on the lessee or user of the property. It is a tax on the privilege of using tax-exempt property. Either counsel doesn't understand that distinction or doesn't care to understand it, one of the two. At least, they contend throughout here that it is a tax on the property rather than on the lessee or user of the property.

Now I think we can take an analogous situation this way. I, of course, represent the School District. Now, we have a playground out there. If we could lease a good part of that to, oh, Morton Manufacturing Company, or maybe to Continental, tax free, may be we wouldn't have to collect taxes from Continental. We would make enough out of the rent if we could lease it tax free. But the moment that School District converts a part of their property to commercial use, they lose their tax exemption immediately.

Now, we see no reason why the same principle should not apply to federally-owned property. Now it may be that the State of Michigan has lost sovereignty over its own soil in view of Supreme Court decisions, but I am quite sure that the State of Michigan has not lost sovereignty over its own citizens, and the right to tax the privileges of its citizens to engage in business for profit. And that is exactly what this Act is designed to do. I won't go into many cases. I'll furnish a brief on it. I am sorry I was not able to get it prepared in time, but they seem to have me busy stipulating.

to the facts in this case. There is a very good annotation in 21 A.L.R. 248.

The Court: A.L.R. Second?

Mr. Street: No. That is A.L.R. first.

The Court: What is the page number?

Mr. Street: 248. I will also incorporate it in my brief so the Court, if the Court wants to take notes in advance, he can.

That summarizes a large number of cases where the lessees of immune or exempt property are made subject to tax.

One of them, particularly, involved the Hot Springs National Park, which was federally-owned property, in Hot Springs and certain concessions were leased out to individual citizens engaged in business for profit, and the State of Arkansas levied a tax on the lessees now of federally-owned property, which is almost identically the same thing we are doing; and that tax was upheld as constitutional as being upon the citizens of Arkansas.

There is a similar case, or, there are several of those cases. There are many of them involving state lands and others involving federal lands. There is a Hawaiian case that is very similar. The Hawaiian case goes even further into this matter that is raised in the briefs too. Defendants claim along this line; They say you assess the value of the fee and then you pass that on to the lessee or user, that that is not legal or isn't good, and that you make no effort to assess the value of the use as such and levy on that basis. Well, the Hawaiian case, they did it exactly the same way. The statute provided that they valued the fee and then they assessed the lessee on the same rate as if he were the owner.

of the fee, just as we do in this case, and the Court held that that was not an arbitrary means of assessing the lessee. We have many over a long period of years, in principle, the same thing that we have in this Act.

Now we contend it is not necessary to make a separate appraisal of the value of the use. We can compare it to our own use tax. If you go over to Ohio, we'll say, and buy a new car and bring it back into Michigan, you must pay a use tax on that car. Now there is no effort made to assess the value of the use whatsoever. In fact, you may be going to let your wife use it, so you have no use at all out of it. Yet, the assessor says, "Here is the value of the car. The use tax is so much." And it is the same type of situation here. We are simply taking the value of the fee and then we treat that as the value of use because the value of the use may, in some instances, greatly exceed the value of the fee simple title itself.

A case such as this might be the case. Assuming Continental has an extremely valuable contract, which they appear to have, are a little bit reluctant to tell us just how much profit they make out there, we come to an extension on that. It is entirely conceivable that a person may have a contract right which makes the use of this particular piece of property worth more to that individual than the actual fee title would be. In other words, if Continental made it's assessed \$3,000,000, if it made \$4,000,000 in profit last year, the use of the land to them was worth more than the actual fee simple title itself.

Now, the only case that counsel cites, at least, that gets to the heart of this thing at all, is the Allegheny County case. It is in their brief. They contend that on the basis of the Allegheny County case that Act 189 is unconstitutional. The Allegheny County case involved this situation. The

Mesta Corporation had a contract with the Government. They owned their own plant and were paying taxes on it, but the Government financed, in some instances, in others outright bought, vast quantities of equipment to go into the plant. The Mesta—personal property. This equipment, though bolted to the floor, was stated in the opinion that it was all removable without any damage to the real estate. Quite clearly it was personal property.

The assessor came along and assessed it. He assessed the real property on it so much and then he assessed this equipment at so much in another column. And that tax was contested because title to all of that equipment was in the United States Government. It could have if, had bought it or had reimbursed the Mesta Corporation for it. And the Court held that tax was illegal as to the personal property where title was in the United States Government.

We don't particularly quarrel too much with the decision. There was a dictum in the case that might, by stretching it a little, make it appear to apply in this case, though the case has been distinguished so many times since that it is even doubtful that it is law on the point that it held, and certainly the dictum in that case no longer represents the law.

I want to refer to just one other case that, if it doesn't completely overrule Allegheny County by inference, at least it represents the modern view of our Federal Court relative to the right of the State to impose taxes on lessees or users of that type of situation. That is the Esso Standard Oil versus Evans, a recent decision. In that particular case, one of the states, I believe it was, yes, it was Tennessee, imposed a tax on those who stored gasoline, a tax on the privilege of storing gasoline. Now, Standard Oil, in this particular case, stored all governmentally owned gasoline, title to this

gasoline was all in the United States Government. It was airplane gasoline. The tax, in some instances, exceeded the amount of money the Government paid Standard to store the gasoline.

And the tax was challenged, and ultimately went to the United States Supreme Court, and was upheld. The Court, in making its decision, said that the State of Tennessee had a right to tax the privilege of storing gasoline just as we claim the right to tax the privilege of use of this plant, and discuss this matter of the legal incidence of tax as opposed to the burden of tax. The notation at the end of that case is rather interesting. It is short. It says, "The holding in Esso Standard Company v. Evans, is that the constitutional doctrine of implied inter-governmental immunity does not invalidate a state privilege tax on the business of storing gasoline; measured by the quantity of gasoline stored, as applied to a contractor with the United States who stores gasoline owned by the federal government."

The case shows a further retreat from, if not a complete repudiation of, the case of Panhandle Oil Company versus Mississippi." And cited many others.

The more recent view of this very complex and difficult problem of this inter-immunity between Governments, there has to be an adjustment in view of this great expanse of our Federal Government. Our own State Supreme Court very recently commented on both the Esso case and the Allegheny County case, and Federal Reserve Board versus Revenue Department, which I'll discuss in my brief. I believe that covers my remarks unless the Court has some questions.

Mr. Klein: If the Court please, admittedly, in the absence of Act 189 on tax assessment date, January 1, 1954, this real property owned by the United States, occupied by Continental was immune from Federal, from State ad-

valorem taxation. The one question that was involved in the 1953 case, the question of barren record title, which we say is unimportant in view of the decisions that recording is not a controlling factor in ownership of Government property. But that question is not before the Court, in this case, because, as of tax assessment date, full legal title, beneficial title, control, custody, the power of disposition was all in the United States. The State, its subdivision, was without power because of the federal constitutional immunity of Government-owned property; it was without power to assess an ad valorem real estate tax upon this property, either to the United States or to Continental, as the user thereof. And it is interesting to note that in this United States versus Allegheny, and contrary to the suggestion of Mr. Street, the United States Supreme Court, in its most recent decision, discussing the question of federal immunity, of immunity of federally-owned property, has reaffirmed the principle of Allegheny, and it reaffirmed it in the Esso case expressly; And our State Supreme Court and the Federal Reserve Bank case expressly referred to the Allegheny case, and recognized it as prevailing and controlling law.

It is interesting to note that in the Allegheny case every argument which is here advanced in respect to the occupation of or use of federally-owned property by Mesta Machine Company in that case was for profit of Mesta. Mesta was operating and using it for a profit, and the County of Allegheny made that argument, that the tax is going to be borne by Mesta, not the Government. True, it might ultimately be passed on, but it is a tax on Mesta just as the tax here is a tax on Continental. But the Court said there, the State, nevertheless, was without power to impose the tax:

Now, in the Allegheny case, if the Court please, there is

no mistake about the character of the tax. It was clearly an ad valorem tax upon property which, we say, Act 189 is an ad valorem tax upon the property and we will discuss that. Allegheny does not consider the question of privilege or excise taxes. It is purely a question of whether a State or a subdivision thereof has the constitutional power to impose an ad valorem property tax upon property owned by the United States, either directly to the United States or to an occupant using it for profit if you please. And in Allegheny, the Court said the State and its subdivisions were clearly without constitutional power so to do.

Now, it is interesting to observe what Mr. Street said to your Honor this morning and compare what he said to your Honor in his memorandum brief in the '53 case as to the purpose of Act 189. On page, and incidentally, we have not been furnished with a trial brief on the '54 case, and, therefore, we are directing the arguments as we now hear them this afternoon. In his memorandum on page 17, dealing with the '53 case, Mr. Street and other counsel for the tax authorities say the following: "Act 189 of 1953 was obviously a remedial or curative Statute designed to supplement the General Property Tax Act and amounting to an amendment thereto. It arose because of a claim then being asserted that this and other similar properties in the State had become exempt or would become exempt within the near future by transfer of title thereto from RFC to the United States or some agency exempt from taxation. The Act was passed to avoid the disastrous consequences upon the local units of government."

Now, I submit, your Honor, that statement, as amazing and extraordinary as it is, is a candid statement of what the State of Michigan Legislature attempted to do, and that is, by state legislation, to negate, to obliterate, a very important constitutional immunity granted under the Fed-

eral Constitution to property of the United States to be immune or exempt, as the words are sometimes interchangeably used, from State taxation or from taxation by subdivisions of the State.

Now the history of that immunity has been discussed by the Supreme Court of the United States on many occasions. In fact, it is to be noted, your Honor, that in our own state property, ad valorem property tax law, one of the exemptions there listed is the exemption of federally owned property.

Now the question then is did the State of Michigan by adding that express exemption to its General Property Tax Statute give to the United States and its property an immunity which it did not have in the absence of such express statutory exemption. The United States Supreme Court has discussed that as far back as 1885. In the case of Van Brocklin versus State of Tennessee, 117 United States 151, it points out at page 167 "It cannot be doubted that the provisions which speak of the exemption of property of the United States from taxation," and there was a similar exemption in the Tennessee Statute—"are but declaratory, and confer no new right or power upon the United States." Further on page 171 the Court said, "The Legislators of most of the States have afflrm'd the same principle by inserting in their General Tax Acts an exemption of property belonging to the United States. Such a provision"—I am omitting a few words,—"is not the foundation of the exemption, but is inserted only from abundant caution and because the assessment of taxes is to be made by local officers skilled in the valuation of property, but presumably unlearned in legal distinctions." Then the Court in the Van Brocklin case at page 175 makes the distinction between exemption from taxes of property within the will and power of the State to tax, from exemption of immunity

of Federally-owned property which is derived from the Federal Constitution and from all the Government we have, in which they state, "Whether the property of one of the States of the Union is taxable under the laws of that State depends upon the intention as manifested by those laws. But whether the property of the United States shall be taxed under the laws of the United States shall be taxed under the laws of the State depends upon the will of its owner, the United States, and no State can tax the property of the United States without their consent." Now, we submit, if the Court please, that it is not open to the State Legislature with impunity to eliminate or attempt to eliminate, or obviate, or avoid, directly or indirectly, the effect of an immunity constitutionally granted to the United States and to its property. Statutes of the character of 189, if the Court please, where lessees or users have been subjected to taxes in the amount equal to that which have been assessed against the owner otherwise exempt, if those lessees use that property for profit, fall within the ad valorem tax provision where the state has granted an exemption, say to a church, school, or some institution having a public character—the state has the power initially to have imposed the tax. It was not prohibited by federal constitution from so doing. It gave the exemption as a matter of grace, and therefore also had the power to limit the scope of the exemption when the property was no longer used for an exempt purpose.

Where the state has no control over the exemption, it is vested in a fundamental provision of the United States Constitution and Federal law. This type of statute historically appears in ad valorem tax provision. It appears where the property is subject to an ad valorem tax—taxable to a user who uses it for a non-exempt purpose—it is still an ad valorem tax, it is a tax upon the property. If

the Court please, an examination of the act itself indicates that the Legislature is talking about real property subject to taxation in the same amount and to the same extent as though the lessee or user was the owner of such property. It talks in terms of ad valorem taxes. It doesn't talk in the language of a privilege tax. It talks about the assessment or value of property the same as ad valorem taxes are assessed. It is interesting to note the codifier of the Michigan Statutes Annotated placed that section 189 as part of the General Property Tax Law appearing in the 1953 Cumulative Supplement at pages 8 and 9; he did not include it in the section dealing with the specific taxes. In considering the validity of a statute, we submit that your Honor is obliged, where possible, to construe the statute in a manner which will sustain its constitutionality, and such a construction, we submit, may be made if the statute is applied to exemption of real estate where the state has granted the exemption of property over which it at all times has control—such as exemption of churches and schools—in situations where the property is not used for the exempt purposes. Such a statute may be upheld, its constitutionality upheld, but when such a statute, at least as an ad valorem tax as applied to property having an immunity or an exemption by virtue of the federal constitution, is designed to obliterate a federal granted immunity under federal law, it is unconstitutional, at least as an ad valorem tax. Now it is interesting in that connection, your Honor, to note we have the stipulation on page 5, that the assessment here was upon the feehold interest in this property. There was no separate assessment made against any use or leasehold interest in the property against Continental. I am still talking in terms of ad valorem taxation: In other words, whether or not the State of Michigan has the power to have enacted a law imposing a possessory use, that is an ad valorem possessory use to the

extent of its limited leasehold; is not here before the Court, because admittedly that was not done here—it was not separately assessed, and this statute on the face of it does not provide for that kind of an assessment; it provides it shall be assessed in the same manner, and to the same extent, and to the same value as though the lessee were the owner thereof. It did not say it was assessing separately the possessory interest of a user. It clearly is not a possessory ad valorem tax. Now if the Court please we go to the next step where Mr. Street refers, your Honor, to a series of cases in 23 A.L.R. 248. He made reference to the same annotation before the State Tax Commission, and in that annotation, if the Court please, you will find a variety of cases. He refers to a Hawaii case. There the territory of Hawaii owned the property and by statute leased it to a lessee. Hawaii had the control over the property, Hawaii had the power to determine on what basis and on what terms and under what tax situation the lessee could lease property from Hawaii. That is not comparable to this situation at all. We do not have that kind of tax and the State of Michigan could not tax the United States under what terms and under what conditions and under what limitations the United States could lease and use its own property. Hawaii had control of its own property. It could decide, just like the United States could decide, under what conditions it could use or lease that property. Other cases in that annotation were exemptions granted by the State to churches, schools, and so forth; where the State had power to tax the properties to which it granted an exemption. That again is different from the case here where the exemption or immunity is derived from a federal constitution over which the State Legislature had no control or power. Now we come to the question of whether or not this is a privilege tax. To start with, your Honor, historically this type of statute appears in ad valorem tax

provision. Where the particular state has granted exemptions it then has some privileges under what situations it will limit the exemption where the use is for profit and purposes other than the specified exemption purpose. Historically that is the type of statute it is, and says to the user of the otherwise exempt property, "You pay the same tax as the owner would have paid had it not been paid, because you are not using it for exempt purposes." It is still an ad valorem tax, measured on the value of the whole property which has lost its exemption as granted by the State as distinguished from the grant by the Federal Constitution. Furthermore, we find in cases like the Esso case, the privilege there involved was a privilege granted by the State, the privilege to operate business of storing gasoline, just like the state privilege tax to a corporation for the privilege of doing business is granted by the State. It is a general tax, not designed to meet and avoid a constitutional immunity. It is a general tax, general in its application. Here the privilege in question is the privilege of using the property of the United States of America for the limited purpose of manufacturing defense materials for the United States of America, and on a basis where the user may not charge in his price to the United States any occupancy charge because he paid none to the Government. Here the privilege in question is one derived from the United States. The State of Michigan would be without power to limit the use of this property by the United States. It has no power to direct the use as to how it shall use it, and to whom it shall permit the use; and therefore, since it does not have any power to grant or validate the use, it has no power to impose a privilege tax on such granted use. When you go to the next step, considering its use solely to implement the function of the United States Government in preparation of defense under its war power, its right to have an Army and defend the country, certainly the State of Michigan has no power

to impose a tax upon that use for that purpose, or deprive the Federal Government of using it for that limited purpose. It is different in nature than the General Privilege Tax, like a privilege granted to a corporation engaged in business for a profit. This is a privilege derived from the United States over which the State of Michigan can exercise no power and no control. We submit, your Honor, that in form, in substance, in character, and even by counsel's earlier admission that it is a supplement to the General Property Tax Law, this Law relates to ad valorem taxes and to treatment of property otherwise exempt from ad valorem taxes where, we submit, the State has power to grant the exemption or to take it away or to limit it. Historically this type of tax is not a privilege tax and has never been so characterized. And it is interesting to note even in this use tax that is on personal property, to which counsel alludes, the Legislature was very careful to exempt the use of property which the State is prohibited from taxing under the Constitution or Laws of the United States. I am not going into that, but it indicates even where there was an intent to have a privilege tax—and there was no word such as "excise" or "privilege" used throughout—the State Legislature recognized its limitation in this regard. In concluding at this point; if the Court please, we submit if there ever was a case where the State Legislature, if we are to follow what the counsel for the tax authorities say—if there ever was a State Legislature that set out deliberately to avoid the federal immunity derived from the Federal Constitution by subterfuge, by device, this is such a situation. Certainly our Supreme Court and the United States Supreme Court will not long permit or tolerate such obvious subterfuge.

By Mr. Street: If the Court please, I will reply briefly, particularly on the matter of the material in our brief.

Are we to regard this Act as plugging loopholes left in our tax structure? I think an analogous situation was a tax passed in 1900. It was found that a lot of people were giving their property away when they thought they were going to die, and created quite a loophole. The Legislature incorporated into the inheritance tax what we call the gift in contemplation of death. It is entirely different from the gift of inheritance. It was designed to supplement the Act and make the Act effective. We feel it was the same way here. There is another analogy; it seems the backbone of counsel's argument is they are going to make this an ad valorem property tax somehow or other. That identical argument was made with respect to the Michigan Inheritance Tax where "privilege" was nowhere used in the Act. This contention was made in one of the earlier cases, Union Trust Company versus Circuit Judge. The Court pointed out the tax was on a privilege of succession, it was not on the property, and that the ad valorem feature did not render the tax void because its amount is not arbitrary but is based on property that is the subject of the privilege. It is identically the same principle involved here. You use the value of the property as your basis for value, the privilege itself and the subject of the privilege. I believe the analogy is complete. Counsel contends that the Court here should construe this statute as applying only to exempt property such as churches and schools. To so construe would make it meaningless. If a church leases its property that property becomes taxable. I believe that covers everything. I will be prepared to file a brief within a matter of five days.

By Mr. Klein: This Inheritance Tax situation—it is interesting to note in that opinion, like the Union Trust Company case it goes way back, the Court made specific mention of the fact that most succession taxes were his-

torically privilege taxes. The historical nature of succession taxes were they were privileged: Historically here, this type of statute appears in ad valorem tax legislation. The historical background deals here with exemption of property exempt under the ad valorem tax where the state then limits the scope of the exemption of that ad valorem tax. If a state could do what Mr. Street indicates has been done here, there would be no federal immunity of federally-owned property, there would be nothing to it for a state to say, "I now call this a Privilege Tax on the use by a lessee or occupant," which the United States Supreme Court said could not directly be done in the United States versus Allegheny case because they argued we are not taxing the United States, we are taxing the Mesta Machine Company "because the incident of the tax is borne by Mesta and not the Government." In each case the state could do just that, which the Federal Constitution and Supreme Court said the state could not do. On the matter of briefs, since we do not have the benefit of the initial trial brief, I wonder what the pleasure of Your Honor is. Do you want to file a brief?

By Mr. Street: Yes, I will have it in five days.

By The Court: Do you want ten days?

By Mr. Klein: Yes.

By Mr. Spaniela: I have an observation I would like to make, if the Court please. Any tax but a privilege tax, or other kind of tax, there has to be a standard for it whereby the amount of tax is to be imposed, and I think it is Mr. Street's position, when the statute refers to taxing the United States in the same manner as if the fee were owned by the lessee, it then becomes a question is the standard unreasonable and not so much as this being an ad valorem tax. I think you will remember in law school days the

question of standard became important in a lot of cases. This is one observation that has not been made and I think it is important for the Court to remember.

By Mr. Klein: May I answer that, sir? If it is a privilege granted by the Federal Government it cannot be the subject matter of a state privilege tax. Ordinarily, in a privilege tax there is a measure of privilege exercised. I am glad this was raised. Here in this case Continental has a privilege to use at will, terminable at will. Obviously, if they are to get into that, I think it is clearly not a measure of the privilege granted. We say there is no power to assert or invoke a privilege tax at all, so we haven't gone into it in oral argument, but since it is raised I wanted to go into it.

By Mr. Turner: If the Court please, the United States merely wants to add its approval to the things that Mr. Klein has already stated here. We do not propose to go back and reargue these matters. Our position is this is the usual garden variety of ad valorem tax which the Supreme Court in the case of Allegheny County said could not be imposed by the state—with the one difference, they have substituted fictionally the Continental Motors as owner of the property instead of the United States, which admittedly they could not tax as owners of the property. In the Allegheny case—and it was reaffirmed in a recent case—we do not think there is any loss of vitality on that particular point and we do not believe the Court can read that case and say all the State had to do was say, "We made a mistake in calling this an ad valorem tax, we will just pass along and say, 'Well, if we can't tax the United States as owner of this property, we will fictionally set up the man using the property, make him the owner and go ahead and tax.'" We don't think the Allegheny County case is so lacking in vitality, or the Supreme Court had such a situation in mind when they handed down the deci-

sion they did. The Allegheny County case is a case in which the Supreme Court spoke quite forcefully on this question about trying to get around immunity of the United States by handing the tax to some individual with which the United States was doing business, and arriving at the same results as taxing the United States. As far as this particular legislation is concerned, I think it shows plainly on the face of it it was put on the books for one purpose and one purpose only, and that was to tax the United States whether the United States had immunity or not, and that is precisely what the Legislature had in mind. They in effect said, "We don't care what immunity the United States has; we are going to tax the United States anyway." It added nothing, in my view, to the constitutionality or of the power of the State to constitutionally tax this property by merely having the Legislature put it down in so many words in the form of a statute. I don't think the State of Michigan can lift themselves by their bootstraps and do something in this fashion that the Federal Constitution clearly prohibits.

By The Court: The Court will consider the matter submitted except for the filing of briefs, and I believe I ought to state at this time I have been most appreciative of the efforts you gentlemen have made in your trial briefs and arguments. I anticipate you will continue to do so.

By Mr. Klein: If the Court please, and I think I speak for this group, thank you for being most gracious to us.

* * * * *

Following the conclusion of the foregoing arguments, the trial judge took the matter under advisement and under date of June 29, 1955 signed the following opinion:

[See page 210 of the printed Record on Appeal for a copy of the opinion.]

True copies of plaintiff's Exhibit A and defendant's Exhibits numbered 1 through and including 12, being all of the exhibits offered into evidence, are attached hereto and constitute a part of this Bill of Exceptions.

STIPULATION OF ATTORNEYS

The attorneys for the parties to the within and foregoing case hereby stipulate that the foregoing Bill of Exceptions is full, true and correct and that the court may make its order settling and allowing the same.

BUTZEL, EAMAN, LONG, GUST
& KENNEDY

Victor W. Klein

By Clifford W. Van Blarcom

and

Joseph T. Riley

Attorneys for Continental Motors
Corporation

Wendell A. Miles

Attorney for United States of America

Charles A. Larnard

Attorney for Township of Muskegon

STREET & SORENSEN

By Harold M. Street

Attorney for School District

Robert A. Cavanaugh

Attorney for County of Muskegon

DATED: October 28, 1955

CERTIFICATE OF TRIAL JUDGE

I, RAYMOND L. SMITH, Circuit Judge for the 20th Judicial Circuit of Michigan, before whom the above case was tried in the Circuit Court for Muskegon County, Michigan, do certify that the foregoing Bill of Exceptions, together with the exhibits therein contained, was duly settled by me on October 28, 1955, in pursuance of orders entered in said cause extending the time to settle said Bill of Exceptions to and including November 5, 1955, and constitutes a true record of the trial proceedings in said cause; that the foregoing contains all of the testimony in said cause; that I deem it necessary to a full understanding of the questions involved that such testimony be set out in full; and that the reasons and grounds for appeal were annexed to such Bill of Exceptions at the time the same was certified by me.

DATED: October 28th, 1955.

Raymond L. Smith
Circuit Judge

EXHIBIT A

House Bill No. 46, introduced January 28, 1953, by Representatives Austin and Nill, ordered printed and referred to the Committee on General Taxation, read as follows:

“A bill to provide for the taxation of lessees and users of tax-exempt property.”

THE PEOPLE OF THE STATE OF MICHIGAN

ENACT:

Sec. 1. When any property, real or personal, which for any reason is exempt from taxation, is leased, loaned or otherwise made available to and used by a private indi-

vidual, association or corporation engaged in business for profit, the lessee or user of such property shall, except as otherwise provided by law, be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property, for which payments are made in lieu of taxes and in amounts equivalent to taxes which might otherwise be lawfully assessed.

**PORTIONS OF JOURNALS OF HOUSE AND SENATE
OF MICHIGAN LEGISLATURE PERTAINING
TO ACT 189 OF PUB. ACTS OF 1953**

HOUSE JOURNAL NO. 30, PAGE 320, MARCH 5, 1953:

"The Committee on General Taxation, by Rep. Anderson, reported **HOUSE BILL NO. 46**, entitled

A bill to provide for the taxation of lessees and users of tax-exempt property.

With the recommendation that the following amendment be adopted and that the bill then pass.

1. Amend section 1, line 4, after "shall", by striking out the comma and "except as otherwise provided by law."

The bill and amendment were referred to the Committee of the Whole and placed on the general orders".

HOUSE JOURNAL NO. 31, PAGE 338, MARCH 6, 1953:

"The Committee of the Whole also reported **HOUSE BILL NO. 46**, entitled

A bill to provide for the taxation of lessees and users of tax-exempt property.

The Committee recommended that the bill be made a special order on the order of general orders for Monday, March 9.

The question being on concurring in the recommendation of the Committee,

The recommendation was concurred in and the bill was made a special order on the order of general orders for Monday, March 9."

HOUSE JOURNAL NO. 33, PAGE 364, MARCH 10, 1953:

"Pending the third reading of

HOUSE BILL NO. 46, ENTITLED

A bill to provide for the taxation of lessees and users of tax-exempt property.

Rep. Austin moved that the bill be made a special order on the order of Third Reading of Bills, for Monday, March 16.

The motion prevailed."

HOUSE JOURNAL NO. 36, PAGES 401, 402, MARCH 16, 1953:

“HOUSE BILL NO. 46, ENTITLED

A bill to provide for the taxation of lessees and users of tax-exempt property.

(Pending third reading, the bill was made a special order on third reading for today on March 10, see p. 364 of House Journal.)

Was read a third time and passed, a majority of all the members-elect voting therefor, by yeas and nays, as follows:

YEAS

Anderson	Goulette	Nill
Austin	Graebner	Novak, Michael
Bassett	Green	Novak, Stanley
Beardsley	Hebert	O'Brien
Betz	Hermann	Orr
Bolt	Horrigan	Pears
Borgman	Hoxie	Peltz
Brigham	Hubbell	Penczak
Broomfield	Hungerford	Pennington
Burns	Jeffries	Romano
Carey	Johnston	Richards
Carroll	Kelly	Root, Cyril H.
Cavanagh	Kohn	Root, Edson V., Jr.
Clements	Kowalski	Smith
Cobb	Kruse	Thomson
Collins	Lebinski	Townsend
Cooper	Lindquist	Trucks
Currie	Lindsay	Warner
deBoom	Litowich	Werner
Doyle	Lohman	Whinery
Emmons	Marshall	Wilk
Engstrom	McMahon	Williams
Erlandsen	Mezzano	Wood, John F.
Estes	Miiler	Wood, Leonard E.
Fletcher	Morrison	Wozniak
Gibbs	Nakkula	Speaker
Gillespie	Nelson	

NAYS

0

MEMBERS PRESENT AND NOT VOTING

Christman Graves Harrelson

3

The House agreed to the title of the bill.

Rep. Austin moved that the bill be given immediate effect.

The motion prevailed, two-thirds of all the members-elect voting therefor."

SENATE JOURNAL NO. 77, PAGE 1247, 1248, MAY 15, 1953:

"The Committee of the Whole, through its Chairman, reported back to the Senate, favorably and with amendments, the following entitled bill:

HOUSE BILL NO. 46, ENTITLED

A bill to provide for the taxation of lessees and users of tax-exempt property.

The following are the amendments recommended by the Committee of the Whole:

1. Amend the body of the bill by striking out section 1 and inserting a section 1 to read as follows:

'Sec. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.'

2. Amend the body of the bill by adding a section 2 to read as follows:

'Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.'

The Senate agreed to the amendments recommended by the Committee of the Whole and the bill as amended was placed on the order of 'Third Reading of Bills.'

SENATE JOURNAL NO. 77, PAGE 1255, MAY 15, 1953:

"The following entitled bill was read a third time:
HOUSE BILL NO. 46, ENTITLED

A bill to provide for the taxation of lessées and users of tax-exempt property.

The question being on the passage of the bill, the roll was called and the Senators voted as follows:

YEAS—27.

Andrews	Flynn	Lane
Beadle	Geerlings	Morris
Blondy, Chas. S.	Gilbert	Nichols
Brown	Greene	Porter
Cloon	Haggerty	Roy
Coleman	Heath	Ryan
Decker	Higgins	Teahen
Faulkner	Hittle	VanderWerf
Feeenstra	Hutchinson	Walsh

NAYS—0?

HOUSE JOURNAL NO. 79, PAGE 1531, MAY 18, 1953:

"A message was received from the Senate returning with amendments

HOUSE BILL NO. 46, ENTITLED

A bill to provide for the taxation of lessees and users of tax-exempt property.

The following are the amendments made to the bill by the Senate:

1. Amend the body of the bill, by striking out section 1 and inserting a section 1 to read as follows:

'Sec. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.'

2. Amend the body of the bill by adding a section 2 to read as follows:

'Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due,

such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.'

The message informed the House of Representatives that the Senate had passed the bill as thus amended and had ordered that it take immediate effect.

The Speaker announced that under Rule 59 the bill would lie over one day."

HOUSE JOURNAL NO. 81, PAGE 1602, MAY 20, 1953:

"The Speaker laid before the House

HOUSE BILL NO. 46, ENTITLED

A bill to provide for the taxation of lessees and users of tax-exempt property.

(The bill was received from the Senate on May 18 with amendments made by the Senate; consideration of which, under the rules, was postponed until May 19.)

(For amendments, see page 1531 of House Journal.)

The question being on concurring in the adoption of the amendments made to the bill by the Senate,

The amendments were concurred in, a majority of all the members-elect voting therefore, by yeas and nays, as follows:

YEAS

Anderson	Brigham	Cobb	Davis
Austin	Burns	Collins	deBoom
Bassett	Carey	Conlin	Dingman
Bearsley	Carroll	Cooper	Dunn
Beck	Cavanagh	Copeland	Emmons
Betz	Christman	Cramton	Engstrom
Bowerman	Clements	Currie	Erlandsen

YEAS

Fletcher	Litowich	Richards
Gibbs	Lohman	Romano
Gillespie	Mahoney	Root, Cyril H.
Goulette	Marshall	Root, Edson V., Jr.
Graebner	McCune	Smith
Graves	Mezzano	Thomson
Green	Miller	Townsend
Harrelson	Morrison	Trucks
Hebert	Murphy	Warner
Hermann	Nakkula	Werner
Hubbell	Nill	White, Mrs.
Jeffries	Novak, Michael	Wilkinson
Johnston	Novak, Stanley	Williams
Kelly	O'Brien	Wood, John F.
Kohn	O'Connor	Wood, Leonard E.
Kruse	Peltz	Wozniak
Lesinski	Penczak	Speaker

79

NAYS

0"

EXHIBIT 1

DETROIT ORDNANCE DISTRICT

6301 West Jefferson Ave.

Detroit 31, Michigan

To insure prompt attention

in replying refer to:

D.O.D. No. _____

Attention of

ORDEF-PN

LETTER ORDER FOR FACILITIES

(No Price Stated)

Continental Motors Corporation

1470 Algonquin Avenue

Detroit 14, Michigan

Contract No. DA-20-018-ORD-11272

Date: 27 February 1951

Place: Detroit Ordnance District

6301 W. Jefferson Avenue

Detroit 31, Michigan

Gentlemen:

1. An order is hereby placed with you to furnish the services and facilities necessary to establish at or in your facilities, including your subcontractors, a production capacity to manufacture on a three-shift basis 1,200 AV-1790 engines plus spare parts therefor and also 700 AOS-895 engines plus spare parts therefor per month. The undertaking in this connection to include the procurement for Government account of the necessary machine tools, capital equipment and production aids and the installation thereof and the necessary plant rearrangement in connection therewith and including building modification and construction of test cells in Plantor 166, all to

the extent necessary after giving due consideration to the availability of similar facilities procured and now in your possession under Contracts No. W-20-089-ORD-3587 and W-20-089-ORD-2907. The cost of the project is now estimated to be \$8,000,000.00, with no fee to you.

2. You are directed, upon your acceptance of this order, to proceed immediately with the procurement of the necessary machine tools, equipment, production aids and services called for in Paragraph 1, above, and to pursue such work with all diligence to the end that the production capacity contemplated by this Letter Order may be established at the earliest practicable date.

3. There is incorporated herein by reference all applicable articles (other than the Article "Termination for the Convenience of the Government"), now required by Federal Law, Executive Order, Armed Services Procurement Regulations, Joint Procurement Regulations, Procurement Circulars and Department of the Army Directives to be included in a cost type facility contract for the creation of production capacity and use thereof.

4. By your acceptance hereof you undertake without delay to enter into negotiations with the Department of the Army looking to the execution of a definitive contract which will be of the type and follow the form outlined in Section 13 of the Armed Services Procurement Regulations and which will include all applicable articles required by Federal Law, Executive Order and Department of the Army Procurement Regulations to be included in contracts for facilities of the kind herein described.

5. Pending the execution of a definitive contract, you are authorized to spend, in furtherance of your performance hereunder, not more than Eight Million Dollars (\$8,000,000.00) in the aggregate.

6. (a) In case the definitive contract is not executed within one hundred twenty (120) days from the date of the acceptance of the said Letter Order (or any subsequent date at any time mutually agreed upon) because of the inability of the parties hereto to agree upon a definitive contract, this Letter Order will terminate on the stated date or such subsequent date as the case may be, the applicable date being the effective date of termination.

(b) The Government may at any time terminate this order in whole or in part for its convenience by giving you written notice of such termination stating therein the effective date of termination.

(c) In the event of any termination pursuant to either Paragraph 7(a) or Paragraph 7(b) of this order, you and the Contracting Officer will attempt to agree by negotiation upon a settlement estimated by the parties to be the aggregate amounts (less payments previously made to you) of the costs incurred by you in the performance of this order and the amounts paid or to be paid by you or for your account in settling with the approval of the Contracting Officer your obligations for commitments made in the performance of this order. In lieu of reimbursing you for expenditures made by you in settling any of your obligations for commitments, the Government, in the discretion of the Contracting Officer, may assume such obligations, or any of them. The total of such reimbursement (and of all payments previously made) together with the amount of any obligations assumed, shall not exceed the amount above specified.

(d) The Government may permit you to sell or retain at prices or on terms agreed to by the Government any equipment, completed supplies, materials or work in process and the proceeds of any such sale, or such agreed

prices, shall be paid or credited to the Government in such manner as the Contracting Officer may direct.

(e) Upon payment, or reimbursement to you pursuant to Paragraph 7(c) or 7(d) of this order, title to all equipment, completed supplies, work in process, materials, plans, information and other things for which you are so paid or reimbursed (except such property as may be sold or retained by you as above provided) will vest in the Government. The Government will also become entitled to any rights under any commitment which it may assume, or for the settlement of which it shall have reimbursed you.

(f) Any dispute which arises under this Paragraph 7 regarding a matter of fact (including any dispute as to whether termination has in fact taken place for the convenience of the Government or because of the inability of the parties to agree upon a definitive contract, will be treated and resolved as a dispute under the "Disputes" Article as set forth in Paragraph 7-103.12 of the Armed Services Procurement Regulation hereby incorporated in this order by reference.

(g) Partial payments on account of any amount admittedly due to you pursuant to this Paragraph 7 may be made by the Government at any time in the discretion of the Contracting Officer.

8. The sums to be expended by the Government hereunder are chargeable to the following allotment, the available balance of which is sufficient to cover the same:

Amount	Appropriation
\$8,000,000.00	5-5003 P133-09 A2111005 S20-089 DEF A.C. 03-137

9. Your acceptance of this order will be indicated by affixing your signature to this Letter Order and two (2) copies thereof and mailing or delivering the executed original and one (1) executed copy to the Contracting Officer not later than 15 March 1951. Such acceptance will constitute this order a contract on the terms set forth herein.

10. This instrument is authorized by and has been negotiated under Section 2(c) (1) of the Armed Services Procurement Act of 1947 (Public Law 413, 80th Congress), the required justification and determination pursuant to ASPR-3-201 having been made.

THE UNITED STATES OF AMERICA

BY /s/ George W. Patterson
Contracting Officer

ACCEPTED March 1, 1951

CONTINENTAL MOTORS CORPORATION

BY: /s/ A. Wild

A. Wild

(Seal)

TITLE: Vice President

Detroit, Mich.

(Address)

Priority Rating DO-21 is hereby applied. Certified under NPA Regulation Number 2.

/s/ George W. Patterson
Contracting Officer

I, J. Sears, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that A. Wild, who signed this Letter Order on behalf of the Contractor was the Vice Pres. of said corporation; that said Letter Order was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(Affix
/s/ J. Sears (Corporate
J. Sears, Asst. Secretary (Seal

(Seal)

EXHIBIT 2

Cost Type Definitive Contract

Negotiated by Detroit Ordnance
District Pursuant to Section
2(e) 1 of the Armed Services
Procurement Act of 1947 and
OCO 21-51

Contract No. DA-20-018-ORD-11272

Supplement No. 2

Previous Instrument: Supplement No. 1

Unexecuted Instruments: None

**DEPARTMENT OF DEFENSE—(ORDNANCE CORPS)
SERVICE AND FACILITY CONTRACT**

CONTRACTOR: Continental Motors Corporation

ADDRESS: 1470 Algonquin
Detroit 14, Michigan

SUPPLEMENT FOR: Creation of Capacity to Manufacture Tank Engines and Spare Parts and for Use, Care, Custody and Return of Facilities.

MAXIMUM COST REIMBURSABLE: \$9,961,431.00

(This Supplement Formalizes a Letter Contract
Issued in the Amount of \$8,000,000.00)

PLACE: Detroit Ordnance District
Detroit 31, Michigan

PAYMENT: Invoice documents for deliveries made and/or services performed under this contract should be billed and sent to the Department of the Army, Detroit Ordnance District, 574 East Woodbridge Avenue, Detroit 31, Michigan, Attention: Fiscal Division. Payment will be made in accordance with the terms of this contract by the Finance Officer, 6301 West Jefferson Avenue, Detroit 17, Michigan.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following allotment, the available balance of which is sufficient to cover payment for same:

Allotment	Amount
A211/22011 5-7141 P110-09 (S20-018)	\$9,961,431.00 DD

AUTHORIZATION: This instrument is authorized by and negotiated under the Armed Services Procurement Act of 1947 (Public Law No. 413, 80th Congress), Section 2 (e) 1, Presidential Proclamation 2914 of 16 December 1950 and OCO 21-51.

THIS SECOND SUPPLEMENTAL AGREEMENT, entered into as of 28 April 1951, by and between **THE UNITED STATES OF AMERICA**, hereinafter called "the Government," represented by the Contracting Officer executing this contract, and **CONTINENTAL MOTORS CORPORATION**, hereinafter called "the Contractor," a corporation organized and existing under the laws of the State of Virginia, with offices located in the City of Detroit, State of Michigan.

WITNESSETH THAT:

WHEREAS, there exists between the parties hereto a Contractual relationship in the form of a Letter Contract identified as DA-20-018-ORD-11272 which has heretofore been amended by Supplement No. 1; and

WHEREAS, the parties now desire to again amend this Contract with a more formal and definitive agreement; and

WHEREAS, the parties hereto also desire to provide for the care, custody, and use by the Contractor of the facilities procured, assembled and readied hereunder in the plants of the Contractor, commonly known as Continental Motors Corporation;

NOW, THEREFORE, the parties hereto do mutually agree as follows:

ARTICLE I SCOPE OF THIS CONTRACT

(A) (1) The Contractor, within the shortest practicable time, shall acquire or manufacture for the Government's account the facilities listed in Schedule "A," attached hereto, the estimated costs of which are therein stated, and shall install the same and shall accomplish the plant rearrangement, building modifications, and construction of test cells in Plancor 166 necessary to establish at or in your facilities, including your subcontractors, a production capacity to manufacture on a three shift basis 1200 AV-1790 Engines plus spare parts therefor and also 700 AOS-895 Engines plus spare parts per month. With the prior written approval of the Contracting Officer as to their character and estimated costs, the Contractor may substitute facilities similar to those listed in Schedule "A," or the Contractor may add additional facilities thereto, in which event said Schedule "A" will be modified accordingly; provided, however, the actual costs reimbursed to the Contractor pursuant to paragraph (B) below, for facilities listed in Schedule "A" or such similar facilities as the Contractor may substitute therefor and such additional facilities as the Contractor may add thereto, shall not exceed the sum of **NINE MILLION NINE HUNDRED SIXTY ONE THOUSAND FOUR HUNDRED THIRTY ONE (\$9,961,431.00) DOLLARS** or such additional amount as may be agreed upon by the Contractor and the Contracting Officer. Such facilities shall be installed by the Contractor in its plant or plants, or, if approved in writing by the Contracting Officer, in the plants of Subcontractors. The Contractor shall insert provisions in all subcontracts under which such facilities

are furnished to the subcontractors whereby there will be made applicable to the Government and the subcontractors substantially the same rights and obligations in respect to such facilities as are made applicable to the Government and the Contractor under this Article.

(B) Upon inspection and acceptance of the facilities by the Contracting Officer, and upon the Contractor's furnishing satisfactory evidence that it has made payment or incurred the costs as the case may be, the Government shall reimburse the Contractor for the actual costs of Schedule "A" facilities, approved by the Contracting Officer. The term "actual costs," as used in this Article, means the following:

- (1) For facilities procured by the Contractor from sources other than its own manufacture:
 - (a) The net invoice price to it of the facilities;
 - (b) The costs of transportation, *provided* that no costs of transportation shall be separately reimbursed when the invoice price reimbursed under (1) (a) hereof includes the costs of transportation;
- (2) For facilities manufactured by the Contractor:
 - (a) The net invoice price to it of all direct materials required in manufacture;
 - (b) The costs of transportation, *provided* that no costs of transportation shall be separately reimbursed when the invoice price reimbursed under (2) (a) hereof includes the cost of transportation;
 - (c) The costs to it of all direct labor required in manufacture;
 - (d) An amount equal to 75 percent of item (2) (c) hereof as an allowance for all overhead and administra-

tive expenses. The Contractor represents, based on experience, that this amount does not include any element of profit, and represents no more than actual costs allocable to manufacture.

The Contractor shall install all Schedule "A" facilities at no expense to the Government in addition to the contract price.

(3) For the installation of facilities acquired or manufactured hereunder, when effected by the servants, agents or employees of the Contractor:

(a) The net invoice price to it of all direct materials required for installation;

(b) The costs of transportation, provided that no costs of transportation shall be separately reimbursed when the invoice price reimbursed under (3) (a) hereof includes the cost of transportation;

(c) The costs to it of all direct labor required for installation;

(d) An amount equal to 75 percent of item (3) (c) hereof as an allowance for overhead and administrative expenses. The Contractor represents, based on experience, that this amount does not include any element of profit, and represents no more than actual costs allocable to installation.

(4) For the installation of facilities acquired or manufactured hereunder, when effected by persons other than the servants, agents or employees of the Contractor:

(a) The net invoice price to it of the installation.

(C) In the event the Contracting Officer shall determine, at any time prior to installation of any item of Schedule "A" facilities, that such item is not reasonably

necessary for the performance of any prime contracts with the Government or any subcontracts under Government prime contracts, as recited herein, or any other contract or subcontract for the performance of which the use of that item has been authorized, he may by written order exercise one of the following options with respect to that item:

(1) If the Contractor has made no binding commitment and incurred no expense therefor of a kind reimbursable hereunder as an actual cost, the Contracting Officer may eliminate the item from Schedule "A" and the Government shall be relieved of any liability therefor.

(2) If the Contractor has made a binding commitment or incurred expense therefor of a kind reimbursable hereunder as an actual cost, the Contracting Officer may direct the Contractor to stop all further work and the making of all further commitments thereon and eliminate the item from Schedule "A." In that event the Contractor and the Contracting Officer will attempt to agree on an amount which will reasonably compensate the Contractor for the actual cost incurred by him with regard to such eliminated item. If no such agreement is reached within thirty (30) days after the date of elimination (or within such longer period as may at any time be mutually agreed upon), the Contractor will be paid an amount, if any, which together with all sums previously paid by the Government on account of the item, shall be sufficient to reimburse the Contractor for expenses paid and the settlement of any obligation incurred by the Contractor thereon. In lieu of reimbursing the Contractor for the settlement of obligations, the Government, in the discretion of the Contracting Officer, may assume such obligations or any of them. In no event shall the aggregate of reimbursement on account of the item (and of all payments previously made)

together with the amount of any obligations assumed, exceed the actual costs, as herein defined, expended or incurred thereon up to the time of such elimination, plus any reasonable termination charges by subcontractors and any reasonable termination expense. The Contracting Officer may permit the Contractor to sell or retain at prices or on terms agreed to by the Government any materials, supplies, or work in process, and the proceeds of such sale, or such agreed prices, shall be paid or credited to the Government in such manner as the Contracting Officer may direct. Upon payment to the Contractor pursuant to this subparagraph (2), title to all materials, supplies, work in process and other things for which payment is made (except such property as may be sold or retained as above provided) will vest in the Government (if title thereto has not already vested in the Government). The Government will also become entitled to any rights under any commitment which it may assume, or for the settlement of which it shall have reimbursed the Contractor.

(3) The Contracting Officer may direct the diversion of the item, when it shall have been acquired or its manufacture shall have been completed, to the Government or to any person designated by the Contracting Officer. In that event the Government shall reimburse the Contractor for the actual costs of the item in accordance with the provisions of paragraph (B) hereof, with appropriate adjustment in the amount of reimbursable transportation costs. Upon diversion, the item will be eliminated from Schedule "A." The determination of the Contracting Officer that an item of Schedule "A" facilities is not reasonably necessary for the performance of any subcontract under Government prime contracts as recited herein, or any other contract or subcontract for the performance of

which the use of that item has been authorized pursuant to paragraph (E) (2), within the time authorized for such performance, is subject to written appeal by the Contractor within ten (10) days to Chief of Ordnance or his duly authorized representative whose decision thereon shall be final and conclusive upon the parties hereto. Pending this decision, the Contracting Officer shall not exercise any of the above options.

(D) Except with the prior written approval of the Contracting Officer for each such purchase; the Contractor will not purchase any Schedule "A" facilities in which it had any property interest at any time after the commencement of negotiations for this contract.

(E) (1) Title to each item of Schedule "A" facilities shall vest in the Government immediately upon inspection and acceptance thereof by the Contracting Officer, or at such earlier time as the Contracting Officer may designate in writing. Such facilities shall be deemed personal property although they may be affixed to realty.

(2) The Government hereby grants to the Contractor the right to use Schedule "A" facilities, without the payment of rental therefor, only in connection with its work under subcontracts to Government prime contracts as recited herein, and, subject to the written approval of the Contracting Officer and upon such terms as he may prescribe, in connection with any other work, for which the Government and the Contractor may heretofore have contracted, or may hereafter contract, it being understood and agreed that the Contractor has not or will not make any charges whatsoever to the Government in any contract with the Government or in the prices charged to any contractor with whom it may do business when such contractor is a prime contractor with the Government or is

a subcontractor under a prime contract with the Government for rental or use of any of the facilities set forth in Schedule "A" hereof or purchased for Government account hereunder.

(F) (1) The Contractor shall not be liable for loss or destruction of or damage to Schedule "A" facilities, title to which has vested in the Government, (a) caused by any peril while the facilities are in transit off the Contractor's premises, or (b) caused by any of the following perils while the facilities are on the Contractor's or subcontractor's or other premises or by removal therefrom because of any of the following perils:

Fire; lightning; windstorm, cyclone, tornado, hail; explosion; riot, riot attending a strike, civil commotion; vandalism and malicious mischief; aircraft or objects falling therefrom; vehicles running on land or tracks, excluding vehicles owned or operated by the Contractor or any agent or employee of the Contractor; smoke; sprinkler leakage; earthquake or volcanic eruptions; flood, meaning thereby rising of rivers or streams; enemy attack or any action taken by the military, naval or air forces of the United States in resisting enemy attack.

The perils as set forth in (a) and (b) above are herein-after called "excepted perils."

(2) The Contractor represents that it is not maintaining and agrees that it will not hereafter maintain insurance (including self-insurance funds or reserves) covering loss or destruction of or damage to Schedule "A" facilities caused by any excepted peril, and represents that it is not including and agrees that it will not hereafter include in any price to the Government any charge or reserve for such insurance.

(3) Upon the happening of loss or destruction of or damage to Schedule "A" facilities caused by an excepted peril, the Contractor shall communicate with the Contracting Officer and with the Loss and Salvage Organization now or hereafter designated by the Contracting Officer and, with the assistance of the organization employed by the Contractor to perform services in accordance with instructions or regulations of the Government (unless the Contracting Officer directs that no such organization be employed), shall take all reasonable steps to protect the facilities from further damage, separate the damaged and undamaged facilities, put all the facilities in the best possible order, and furnish to the Contracting Officer a statement of: (a) the lost, destroyed and damaged facilities, (b) the time and origin of the loss, destruction or damage, (c) all known interest in commingled property of which the facilities are a part, and (d) the insurance, if any, covering any part of or interest in such commingled property. If and as directed by the Contracting Officer, the Contractor shall make repairs and renovations of the damage facilities. The Contractor shall be reimbursed the expenditures made by it in performing its obligations under this subparagraph (3) including charges made to the Contractor by the Loss and Salvage Organization, (except any of such charges the payment of which the Government has, at its option, assumed direct), as approved by the Contracting Officer and set forth in a Supplemental Agreement.

(4) With the approval of the Contracting Officer after loss or destruction of or damage to Schedule "A" facilities, and subject to such conditions and limitations as may be imposed by the Contracting Officer, the Contractor may, in order to minimize the loss to the Government or in order to permit resumption of business or the like, sell

for the account of the Government any item of facilities which has been damaged beyond practicable repair, or which is so commingled or combined with property of others, including the Contractor, that separation is impracticable.

(5) Except to the extent of any loss or destruction of or damage to Schedule "A" facilities for which the Contractor is relieved of liability under the foregoing provisions of this paragraph (F), and except for reasonable wear and tear or depreciation, the facilities (other than facilities permitted to be sold) shall be returned by the Contractor to the Government, or delivered by the Contractor to any designee of the Government (at the time elsewhere in this Article provided) in as good condition as when received by the Contractor in connection with this contract. In aid of its obligation so to return the facilities, the Contractor shall maintain a program for the proper use, care and maintenance of the facilities, as well as a property control and accounting system consistent with good business practice, and make repairs and replacements.

(6) In the event the Contractor is reimbursed or compensated for any loss or destruction of or damage to Schedule "A" facilities caused by an excepted peril, it shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such loss, destruction or damage, and upon the request of the Contracting Officer, shall at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government in obtaining recovery).

(7) Whenever any item on Schedule "A" facilities has become unserviceable (whether under circumstances which do or do not render the Contractor liable hereunder) the Contractor shall notify the Contracting Officer, and it may then be required by the Contracting Officer to dismantle and prepare the item for shipment, whereupon the item shall be removed promptly by the Government at the Government's expense. The cost of dismantling and preparation for shipment of any item which has become unserviceable under circumstances which do not render the Contractor liable hereunder incurred pursuant to the provisions of this paragraph (F) shall be paid by the Government. The amount of such payment shall be negotiated by the parties hereto and shall be evidenced by an appropriate contractual instrument.

(G) Each item of Schedule "A" facilities shall be suitably marked with an identifying mark or symbol, as directed by the Contracting Officer, indicating that such item is the property of the Government. Upon completion of the installation of such facilities, the Contractor shall submit to the Contracting Officer a detailed inventory list including a description of the identifying mark or symbol on each item.

(H) The Government shall not be responsible for damages to property of the Contractor or for personal injuries to the Contractor's officers, agents, servants or employees, or other persons on the premises as invitees or licensees of the Contractor, arising from or incident to the use of Schedule "A" facilities, and the Contractor shall save the Government harmless from any and all such claims; provided, that nothing in this paragraph shall be deemed to affect any liability of the Government to its own employees.

(I) The Government shall at all times have access to the premises wherein any Schedule "A" facilities are located.

(J) Except as otherwise in this contract specifically provided, the Contractor shall not remove or otherwise part with the possession of any Schedule "A" facilities. The Contractor shall not pledge or assign, or transfer or purport to transfer title to any of such facilities in any manner to any third person, either directly or indirectly, nor do or suffer anything to be done whereby any of such facilities shall or may be seized, taken in execution, attached, destroyed or injured. Any violation of the provisions of this paragraph or of paragraph (F) hereof shall entitle the Government forthwith to enter upon the premises wherein such facilities are found and remove the same.

(K) In the event the Contractor or the Contracting Officer shall determine, at any time after installation of any item of Schedule "A" facilities, that the item is not reasonably necessary for the performance of Government prime contracts as recited herein or any other contract for the performance of which the use of such facilities has been authorized, such items shall be placed in standby condition pursuant to paragraph (L) of this Article I, or the Contracting Officer may, at that time or subsequently, direct its removal from the Contractor's plant by written notice of his intention to remove such item. This determination by the Contracting Officer is subject to written appeal by the Contractor within ten (10) days to the Chief of Ordnance or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. Pending this decision, the facilities shall remain in the Contractor's plant available for use. At any time within one (1) year after completion or ter-

mination in whole or in part of such contracts, the Contracting Officer may serve on the Contractor a written notice of his intention to remove all the Schedule "A" facilities or any portion thereof. Within the shortest practicable time after service of a notice under this paragraph (K), and in no event later than fifteen (15) days thereafter (unless a longer time is allowed by the Contracting Officer), the Contractor will have dismantled and prepared for shipment the items affected. Prior to the commencement of the work of dismantling and preparing the work for shipment, the parties shall attempt to negotiate a supplemental agreement providing for the payment to the Contractor of a sum or sums agreed upon as representing the reasonable expenses of dismantling and preparing the items for shipment. In the event the parties fail to enter into such a supplemental agreement, the Contractor shall receive reimbursement for the Government for his costs of performing such work. Upon notification from the Contractor that the items are ready for shipment, the Government shall remove them at the Government's expense.

(L) If, upon the completion or termination of this contract or the Government prime contracts as recited herein wherein the Contractor is a subcontractor and other contracts entered into between the Government and the Contractor for the performance of which the use of Schedule "A" facilities has been authorized, no notice pursuant to paragraph (K) of intention to remove an item has been received, the Contractor shall place the item in standby condition, and thereafter maintain it in such condition at its own plant for a period of ninety (90) days from the date of such completion or termination (unless a notice pursuant to paragraph (K) is received in the meantime). All expenses during the standby period shall

be borne by the Contractor, except the costs of dismantling and preparing for shipment, which expenses shall be paid to the Contractor as provided in paragraph (K). In lieu of placing the item in standby condition and maintaining it in its own plant, the Contractor may store the same elsewhere at its own expense, provided that the item can be quickly and readily reinstalled in the production line and production resumed within a reasonable time if necessary in the interest of the Government.

(M) Unless a notice pursuant to paragraph (K) is sooner received the Contractor shall, for a period of nine (9) months after completion of the standby period, store the items affected as follows:

(1) In the plant where the items are then located, or in the Contractor's other plants in the same locality, if space is available thereat and storage will not materially impair the use of the plant or plants for the Contractor's Government or commercial work; or

(2) If space is not available at such plant or plants or storage thereat will materially impair their use by the Contractor, then at any other place or places in the vicinity selected by the Contractor which are considered satisfactory by the Contracting Officer. However, the Contractor's obligation to store under this subparagraph (2) shall cease if such other place or places cannot be obtained by the Contractor, unless the Government shall itself find and designate a place or places of storage.

At the time the items are placed in storage, whether in the Contractor's plant or elsewhere, the parties shall attempt to negotiate a supplemental agreement to this contract providing for payment to the Contractor of a sum or sums agreed upon as representing the reasonable expenses of placing and maintaining the items in storage.

In the absence of such agreement, the Contractor shall be entitled to receive payment, under this contract, of such reasonable expenses. The Contractor's obligation in respect to storage shall be contingent upon the availability of appropriated funds for payment of such reasonable expenses, and if appropriated funds are not available, the Contractor shall be under no such obligation. The items affected shall have been dismantled and prepared for shipment as provided in paragraph (K) within fifteen (15) days after the expiration of the storage period, or, if no storage obligation arises, then within fifteen (15) days after the expiration of the standby period (unless a longer time is allowed by the Contracting Officer). Upon notification from the Contractor that the items are ready for shipment, the Government shall remove them at the Government's expense.

(N) The ninety (90) days standby period, and the nine (9) month storage period, may be eliminated, shortened or lengthened by agreement of the parties on mutually agreeable terms.

(O) The Government reserves the right to furnish to the Contractor f.o.b. the Contractor's plant any or all the items of Schedule "A" facilities upon written notice by the Contracting Officer to the Contractor at any time prior to the installation of such items. In such event the Contracting Officer shall exercise the option described in paragraph (C) (1) or (C) (2) with respect to the item, eliminate it from Schedule "A", and place it on the list of Schedule "B" facilities hereinafter provided for.

(P) The Government shall furnish to the Contractor f.o.b. the Contractor's plant, the Government-owned facilities listed in Schedule "B" attached hereto, not later than the dates shown thereon. Subject to the right of the Con-

tractor to inspect and reject Schedule "B" facilities for good and sufficient reason prior to shipment, the Contractor shall receive the same in their then condition, without warranty expressed or implied on the part of the Government as to serviceability or fitness for use. The Contractor shall install such facilities and shall be reimbursed for his costs for such installation as herein provided in paragraph "B" above. *Schedule "B" facilities shall be held by the Contractor and considered and treated in the same manner as Schedule "A" facilities under and pursuant to paragraphs (E)(2) and (F) to (N) inclusive of this article.*

(Q) The Government shall not be liable to the Contractor for damages or loss of profit by reason of non-delivery or of any delay in the delivery of any of the items set forth in Schedule "B" as it now appears or in any amendments thereon.

(R) Upon demand by the Contracting Officer, the Contractor shall cause a copy of this contract, including any attachments thereto as may be designated by the Contracting Officer, to be filed in accordance with the provisions of any applicable state law to the end that the Government's title to said equipment shall be fully protected; provided, that if this contract includes classified material, only such parts thereof as shall be indicated by the Contracting Officer shall be so filed or recorded.

ARTICLE II

DELIVERY

All of the facilities to be procured or manufactured by the Contractor under this contract shall be completed in accordance with the tenor of this contract on or before the 1st day of June 1952.

ARTICLE III ESTIMATED COST

(A) If at any time the Contractor has reason to believe that it cannot fully perform this contract within the total estimated cost of the contract, the Contractor shall notify the Contracting Officer to that effect and, if appropriate, shall give a new estimate of the total expenditure required to perform this contract together with an appropriate breakdown of such estimate and a statement setting forth the reasons for such anticipated increase in cost so that in the discretion of the Contracting Officer an appropriate increase may be made in the estimated cost.

(B) Any cost incurred by the Contractor in the performance of this contract in excess of the total estimated cost, as revised from time to time, shall not be considered as an item of allowable cost under this contract. The Government shall not be obligated to reimburse the Contractor for any expenditures in excess of such total estimated cost and the Contractor shall not be bound to take any action that would cause the total amount expended by the Contractor in such performance to exceed such total estimated cost.

ARTICLE IV

PAYMENTS

(A) Once a month (or oftener if approved by the Contracting Officer) the Contractor may submit to the Contracting Officer an invoice supported by a statement of cost incurred by the Contractor in the performance of this contract for which reimbursement is sought. Such invoices and statements of cost shall be in such form and reasonable detail as the Contracting Officer shall require. The statements of cost shall be certified by two responsible

officials of the Contractor, one of whom shall be a person supervising accounting with respect to the contract.

(B) Within fifteen (15) days after submission of each invoice and statement of cost, the Government shall make provisional payment, except as provided below, of the amount shown thereon. The Contractor shall execute and deliver at the completion of the contract a release in form and substance satisfactory to and containing such exceptions as may be mutually agreed upon by the Contractor and the Contracting Officer, discharging the Government, its officers, agents and employees of and from liabilities, obligations and claims arising under this contract.

(C) At any time or times prior to final payment on account of allowable cost the Contracting Officer, through the Army Audit Agency or any other representative of the United States Government authorized by then existing U. S. Army or other applicable regulation to audit Ordnance contracts, as may be designated by the Contracting Officer, may cause to be made an audit of the invoices and statements of cost. Each provisional payment shall be subject to reduction to the extent of amounts included in the related invoice and statement of cost which are found not to constitute allowable cost, and shall also be subject to reduction for overpayments or to increase for underpayments on preceding invoices. On submission of the final invoice and statement of cost, the Government shall as promptly as practicable, pay any balance of allowable cost.

ARTICLE V

RECORDS AND ACCOUNTS

The Contractor agrees to keep records and books of account, on a recognized cost-accounting basis showing the cost to it of all items of labor, materials, equipment, sup-

plies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer, but no material change will be made in the Contractor's method if it conforms to good accounting practice and the foregoing costs are readily ascertainable therefrom.

ARTICLE VI

MODIFICATION OF LETTER ORDER

This supplemental contract shall supersede the aforesaid Letter Order dated March 1, 1951. In the event that this supplemental contract contains provisions which may be inconsistent in any particular with the provisions of the aforesaid Letter Order, then the provisions of this supplement shall be deemed to state the complete agreement and intent of the parties hereto, and any rights, duties and/or obligations created by the provisions of the aforesaid Letter Order, which are inconsistent as aforesaid with the terms of this supplement thereto, are hereby waived, cancelled and/or released.

ARTICLE VII

EXCUSABLE DELAYS

Any failure or delay in performance under this contract shall be considered an excusable delay when such failure or delay is due to causes beyond the control and without the fault or negligence of the Contractor. Upon the request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure or delay, and if he shall find that the failure or delay was occasioned by causes beyond the control and without the fault or negli-

gence of the Contractor, he shall revise the delivery schedule accordingly.

ARTICLE VIII OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE IX

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE X DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within thirty (30) days from

the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

ARTICLE XI WALSH-HEALEY ACT

If this contract is for the manufacture or furnishing of materials, supplies, articles or equipment in an amount which exceeds or may exceed \$10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act as amended (41 U.S. Code 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

ARTICLE XII NOTICE TO THE GOVERNMENT OF LABOR DISPUTES

Whenever the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay

the timely performance of this contract, the Contractor shall immediately give notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

ARTICLE XIII ANTI-DISCRIMINATION

In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, creed, color or national origin; and further agrees to insert the foregoing provision in all subcontracts hereunder except subcontracts for standard commercial supplies or for raw materials.

ARTICLE XIV RECORDS OF GOVERNMENT OWNED PROPERTY

The Property Officer, Detroit Ordnance District, is designated as the Officer to maintain the necessary property records in connection with this contract.

ARTICLE XV SUBCONTRACTS

The Contractor shall give notification to the Contracting Officer of any proposed subcontract or purchase order hereunder which is on a cost-plus-fixed fee basis and no such subcontract or purchase order shall be placed without the prior written approval of the Contracting Officer.

ARTICLE XVI CHARGES

The Contractor agrees to pay to the proper authority, when and if the same becomes due and payable, all applicable taxes, assessments and similar charges, which, while

the facilities set forth in the schedule attached hereto are in the possession of the Contractor, may be taxes assessed or imposed upon the Government or the Contractor with respect to or upon said facilities or any part thereof or upon the use of said facilities. The Contractor also agrees to pay all claims or charges for or on account of water, light, heat, power and any other service or utility furnished to said facilities or any part thereof.

Nothing in this Article shall be deemed to prejudice the Contractor in charging any costs it incurs under this Article to any other contracts if such costs are otherwise properly chargeable to such contracts.

ARTICLE XVII BUY AMERICAN ACT

The Contractor agrees that there will be delivered under this Contract only such unmanufactured articles, materials and supplies (which term "articles, materials and supplies" is hereinafter referred to in this clause as "supplies") as have been mined or produced in the United States, and only such manufactured supplies as have been manufactured in the United States substantially all from supplies mined, produced, or manufactured, as the case may be, in the United States. Pursuant to the Buy American Act (41 U.S. Code 10a(c)), the foregoing provision shall not apply (i) with respect to supplies excepted by the Secretary from the application of that Act; (ii) with respect to supplies for use outside the United States, or (iii) with respect to the supplies to be delivered under this contract which are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or

(iv) with respect to such supplies, from which the supplies to be delivered under this contract are manufactured, as are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, provided that this exception (iv) shall not permit delivery of supplies manufactured outside the United States if such supplies are manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

ARTICLE XVIII PRICE REDETERMINATION IN SUBCONTRACTS

The Contractor agrees that it will include in any subcontracts between it and a Prime Contractor calling for the manufacture of engines or spare parts and in connection with which manufacture any part of the facilities covered hereby are used by the Contractor, a price redetermination article in substantially either the following form or such other form as the Contracting Officer may approve:

"The prices set forth in this Contract (or Purchase Order) shall be subject to redetermination by Buyer and Seller from time to time upon the request of either party, provided that the total contract price, exclusive of adjustments made pursuant to the changes condition hereof, shall not be increased by more than 15%. Redetermined prices agreed upon between the Government and the Seller shall be used as the basis for redetermining prices between Buyer and Seller under this condition."

ARTICLE XIX ALTERATIONS

SCHEDULE "A"

The Lot or Group of Facilities
to be Supplied
By the Contractor to the Government
(1st Planning List)

Contract No. DA-20-018-ORD-11272
Supplement No. 2

Item No.	Description	Unit No.
1	#RS-10-66 Single Ram, Broach	1
2	#HAS-15-72 Horizontal, Broach	1
3	#HAS-15-90 Horizontal, Broach	1
4	#T-10-36 Vertical, Broach	1
5	#UBS-984, Broach	1
6	Multi-Press G05-C09	1
7	GMR #HD, Balancing Machine	1
8	#221, Borings	12
9	#416 Horizontal, Boring	1
10	#47, 2U, 2 Way, Boring	1
11	DB-1212-A, Borings	4
12	11 Spindle Horizontal, 2 Way, Boring	1
13	Auto-Index, 3 Way, Two Spindle, Drill	1
14	1½ x 61, Drill (Deep hole)	3
15	½ B x 30", Drill (Deep hole)	1
16	1B x 50, Drill (Deep hole)	2
17	Single Spindle #307; Drill	1
18	Two Spindle #4B 12"; Drill	1
19	Single Spindle #4B 16"; Drill	1
20	Drill & Ream 6 Spindle, Drill	1
21	Nateco #C2B Vertical, Drill	1
22	Nateco #C3A Vertical, Drill	1
23	#2VB, Drill	1
24	#3MS-24" S. Spindle, Drills	10
25	Radial 3' 9", Drill (Radial)	4
26	#14 St. Bevel, Gears Generators	3

27	#12 Tool Sharpener, Gears Generators	1
28	#12 B, Gears Generators	1
29	#7 St. Revex, Rougher	1
30	#16 Quenching, Press	1
31	Model Z, Shaper	1
32	#6 Angular Hand Rolling, Testers	3
33	6 x 18 Plain, Grinders	2
34	#3 Centerless, Grinders	3
35	#ER Plain Hydraulic, Grinder	1
36	Cutter & Tool, Grinders	2
37	Crankpin 25 x 72, Grinder	1
38	Type CH, 14 x 72, Grinders	3
39	Radial Dresser, Grinder	1
40	42 x 28 Tool, Grinder	1
41	4 x 12 #H, Grinder	1
42	Valve Seat #AWAO, Grinders	2
43	#400-J4 Themac, Grinder	1
44	#125-26", Grinder	1
45	Chip Breaker, Grinders	2
46	Pedestal GPOA, Grinder	1
47	Dry Carbide Tool Model D-10-SB, Grinder	1
48	#271 Internal, Grinders	2
49	12 x 45, Thread Grinder	1
50	20" Single Wheel Tool Bit, Grinder	1
51	Tool Drill #1-B, Grinder	1
52	Drill #3-B, Grinder	1
53	47" Carbide, Grinder	1
54	Vertical Surface #18, Grinders	2
55	10 x 48 CTU Semi-Auto, Grinders	3
56	14 x 36 LC Semi-Auto, Grinder	1
57	10 x 18 CTU Semi-Auto, Grinder	4
58	10 x 36 Angular, Grinder	1
59	6 x 18 CTU Semi-Auto, Grinders	2
60	10 x 36 CTU Plain, Grinder	1
61	10 x 72 CTU, Grinders	2

62	Carbide, Type 7, Model 1200, Grinder	1
63	20" x 8', Lathe	6
64	#4, Lathe	1
65	8 x 21 Stud, Lathe	1
66	3½-6 Spindle, Lathe	2
67	Model #N 4 x 8, Low Swing, Lathe	1
68	#22A Universal Turret, Lathe	1
69	10" x 20" Model EE, Lathe	2
70	20 x 96 Model M, Lathe	1
71	DH 8, Lathe	1
72	Pini CFB-6CF, Lathe	1
73	#7A Spool Type, Lathe	1
74	20 x 25 Auto, Lathe	4
75	8 x 21 Auto, Lathe	3
76	#4 Turret, Universal, Lathe	3
77	14 x 30 Pacemaker, Lathe (Engine)	1
78	Engine Model "AA" 14" x 30", Lathe	1
79	Single Spindle #3 CB, Lathe	1
80	Polishing & Buffing, Lathe	2
81	Chuck & Turn #3-4, Lathe	2
82	17" x 76" Bed, Lathe	1
83	Chucking PW 25, Lathe	2
84	Spline 10-V-18, Mill	1
85	#26, Mill	1
86	#3CH Vertical, Mill	2
87	#2CH Vertical, Mills	2
88	Twin, Mill	1
89	#28 Hand, Mills	2
90	Vertical, Mill	1
91	#1-14 Hydraulic, Mills	3
92	Turret Type, Mill	1
93	2 Way 2 Spindle, Mill	1
94	6/32 Special, Mill	1
95	#2 Vertical, Mill	1
96	#2 Plain, Mills	0

97	#50 Marking Machine, Mill	1
98	#33 Forming Machine; Mill	1
99	#351-4 x 18 Forming; Mill	1
100	Spot Facer	1
101	#1008, Shears	1
102	#11, Tapping & Threading	1

SCHEDULE "B"

Contract No. DA-20-018-ORD-11272

Supplement No. 2

NONE

SCHEDULE "C"

Contract No. DA-20-018-ORD-11272

Supplement No. 2

NONE

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written

TWO WITNESSES:**THE UNITED STATES
OF AMERICA**By /s/ George W. Patterson
Contracting Officer
(Official Title)/s/ A. O'Connor
Detroit, Michigan
(Address)**CONTINENTAL MOTORS
CORPORATION**
(Contractor)By /s/ H. M. Parker
Asst. Treasurer
Detroit, Michigan
(Business Address)/s/ J. P. Koreck, Jr.
Detroit, Mich.
(Address)

I, W. G. Raven certify that I am the Vice President of the corporation named as contractor herein; that H. M. Parker who signed this contract on behalf of the contractor was then Asst. Treasurer of said corporation; that said contract was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said corporation this 29th day of June 1951.

SEAL (Corporate
Seal)

/s/ W. G. RAVEN,
Vice Pres.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry,
 who signed this contract for the
 had authority to execute the same, and is
 the individual who signs similar contracts on behalf of
 this corporation with the public generally.

(Contracting Officer)

EXHIBIT 3

Cost Type Definitive Contract Negotiated by Detroit Ordnance District Pursuant to Section 2(c) (1) of the Armed Services Procurement Act of 1947 and OCO 21-51	Contract No. DA-20-018-ORD-11272 Supplement No. 7
	Previous Instrument: Supplement No. 6 Unexecuted Instruments: None

DEPARTMENT OF DEFENSE
(ORDNANCE CORPS)
SERVICE AND FACILITY CONTRACT

CONTRACTOR: Continental Motors Corporation
ADDRESS: 12800 Kercheval Avenue
Detroit 14, Michigan

SUPPLEMENT FOR: Right to Use and Occupy
"Plancor 166"

AMOUNT OF THIS SUPPLEMENT: None

MAXIMUM COST REIMBURSABLE: \$13,077,804.24

PLACE: Detroit Ordnance District
Detroit 31, Michigan

PAYMENT: Invoice documents for deliveries made
and/or services performed under this contract should
be billed and sent to the Department of the Army,
Detroit Ordnance District, 574 East Woodbridge
Street, Detroit 31, Michigan, Attention: Fiscal
Branch. Payment will be made in accordance with the
terms of this contract by the Finance Officer, 6301
West Jefferson Avenue, Detroit 17, Michigan.

The supplies and services to be obtained by this
instrument are authorized by, are for the purposes
set forth in, and are chargeable to the following
allotment, the available balance of which is suffi-
cient to cover payment for same:

ALLOTMENT	AMOUNT
NO CHANGE IN FUNDS	

AUTHORIZATION: This instrument is authorized by
and negotiated under the Armed Services Procure-
ment Act of 1947 (Public Law No. 433, 80th Con-
gress), Section 2(c) (1), Presidential Proclamation
2916 of 16 December 1950 and OCO 21-51.

THIS SEVENTH (7th) SUPPLEMENTAL AGREEMENT, entered into this 30th day of June 1952, by and between THE UNITED STATES OF AMERICA, herein-after called "the Government," represented by the Contracting Officer executing this contract, and CONTINENTAL MOTORS CORPORATION, a corporation organized and existing under the laws of the State of Virginia, with offices in the City of Muskegon, State of Michigan, herein-after called "the Contractor";

WITNESSETH THAT:

WHEREAS, there is now in force between the parties hereto a contract identified as Contract No. DA-20-018-ORD-11272, providing for a certain production capacity at Contractor's Getty Street Plant, Muskegon, Michigan, known as "Plancor 166"; and

WHEREAS, Plancor 166 is owned by the Government and is being operated by the Contractor pursuant to a certain Lease Agreement dated as of April, 1949, between Reconstruction Finance Corporation, acting by and through the War Assets Administrator, and the Contractor; and

WHEREAS, the Department of the Army (Ordnance Corps) has taken over accountability and responsibility for Plancor 166 as of 1 November 1950, and it is the desire of the parties hereto to effect a termination of said Lease Agreement as of 1 November 1950, and to Supplement Contract No. DA-20-018-ORD-11272 to provide for the use of Plancor 166 by the Contractor in connection with the production capacity called for by Contract No. DA-20-018-ORD-11272, all as hereinafter set forth.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

1. There is hereby added to Schedule "B" of Contract No. DA-20-018-ORD-11272 a new item of facilities reading as follows:

"The right to use and occupy the land, buildings, improvements, and appurtenances thereunto belonging, building installations, and machinery and equipment located in the City of Muskegon, State of Michigan sometimes known as Plancor 166 for the production of supplies in the performance of contracts or subcontracts under prime contracts with the Ordnance Corps and with contracts or subcontracts under prime contracts with the Government which the Contractor has entered into prior to 30 June 1952, a list of which is attached hereto, and such other contracts as may be approved in writing by the Contracting Officer in accordance with the terms and conditions of Supplement No. 7 to Contract No. DA-20-018-ORD-11272, so long as the use of Plancor 166 is required by the Contractor for such production".

2. The contractor shall forthwith terminate the aforesaid Lease Agreement as of 1 November 1950 and the use and occupancy of Plancor 166 by the Contractor since 1 November 1950 shall be deemed to have been pursuant to the provisions of this Supplemental Agreement.

3. The Contractor further agrees to make available to the Contracting Officer or his duly authorized representative any and all of the books, records, and accounts maintained by the Contractor in connection with Plancor 166 that he may care to have examined or studied in order to establish compliance with the Contractor's undertaking as herein expressed.

4. The Contractor, during the continuance of the said rights to use Plancor 166 shall procure, pay for, and maintain insurance policies on Plancor 166 of types and in

amounts as the Contracting Officer from time to time may direct in writing.

5. The Contractor likewise agrees to pay all proper claims or charges for or on account of water, light, heat, power or any other services or utilities furnished to or with respect to Plancor 166.

6. The Contractor shall pay to the properly constituted authority or authorities as and when the same may become due and payable all taxes, assessments, excises and similar charges which may be lawfully taxed, assessed or imposed upon the Contractor with respect to or upon Plancor 166 or any part thereof, provided, however, that such taxes, assessments, excises or similar charges shall be prorated and apportioned as of the date of this Agreement and as of the date of determination thereof respectively. Nothing herein contained, however, shall prohibit the Contractor from contesting in good faith the validity of any such taxes for assessments.

7. The Contractor agrees that it shall not make any structural alterations to said Plancor 166 except with the prior written approval of the Contracting Officer.

8. Except to the extent of any loss or destruction of or damage to Plancor 166 for which the Contractor is relieved of liability under other provisions of this Contract No. DA-20-018-ORD-1127², and except for reasonable wear and tear or depreciation, Plancor 166 shall be returned by the Contractor to the Government in as good condition as when received by the Contractor.

9. Any termination of the Contractor's right to use and occupy Plancor 166 shall be deemed an act of the Government within the meaning of any excusable delay provision in any contract the Contractor may have with the Government and shall be deemed a termination for the

convenience of the Government of any such contract (or any subcontract under a prime contract with the Government) which cannot be completed because of such termination of the Contractor's right to use and occupy Plancor 166.

10. Article I, Provision (F)-(2) and (E) through (N) of Contract No. DA-20-018-ORD-11272 shall not apply to Plancor 166.

11. The total contract price payable under this contract is neither increased or decreased by reason of this Supplemental Agreement.

12. Except as herein provided the terms and conditions of Contract No. DA-20-018-ORD-11272 shall continue in full force and effect and shall apply equally to the provisions herein contained.

List of Active Contracts and Sub-Contracts
as of June 1, 1952

(Prime Contracts)

DA-20-089-ORD-11270	DA-20-089-ORD-27965
DA-20-089-ORD-728	DA-20-089-ORD-24142
DA-20-089-ORD-27996	DA-20-089-ORD-13211
DA-20-089-ORD-4139	DA-20-089-ORD-3472FS
DA-20-018-ORD-11267	DA-20-089-ORD-1618FS
DA-20-089-ORD-26965	DA-20-089-ORD-13156
DA-20-018-ORD-11604	DA-20-089-ORD-12010
DA-20-113-ORD-52-845	DA-20-089-ORD-296FS
DA-20-018-ORD-11672	DA-20-089-ORD-34923
DA-20-113-ORD-7109	DA-20-28-024-ORD-1949
DA-20-089-ORD-22160	NOb 55693, (Letter Order 17348)
DA-20-089-ORD-5511	DA-20-089-ORD-31480

(Sub-Contracts)

- a. Cost of facilities procured from sources other than his own manufacture:
 - (1) The net invoice cost thereof.
 - (2) The cost of transportation to the Contractor's plant or other place of installation of said facilities, provided, however that no reimbursement shall be owing to the Contractor hereunder when the invoice price described in subparagraph (1) has included the cost of transportation.
 - (3) Any Federal, State or local taxes arising from the acquisition for or delivery of such facilities to the Government.
- b. Facilities manufactured by the Contractor (other than those items included in subparagraph c below): The costs incurred by the Contractor in manufacturing facilities hereunder as determined in accordance with Section XV of the Armed Services Procurement Regulation.
- c. Standard or commercial facilities manufactured by the Contractor in accordance with provisions of Article I-A 5.
- d. For any repair, restoration, or rehabilitation of facilities acquired by the Contractor or furnished by the Government which is necessary in order to make such facilities serviceable or fit for use prior to the commencement of such use:
 - (1) When effected by persons other than servants, agents, or employees of the Contractor:
The net invoice cost to the Contractor of repair, restoration, or rehabilitation.

Prime Contract No. Prime Contractor

DA-20-089-ORD-2931 Cadillac Motor Car Co.

W-20-089-ORD-2972 American Car & Foundry

DA-30-115-ORD-22 American Locomotive

DA-20-089-ORD-2995 International Harvester

DA-20-089-ORD-4032 Pacific Car & Foundry

DA-04-200-ORD-29 Pacific Car & Foundry

DA-20-089-ORD-4408 Alvis Chalmers

DA-20-089-ORD-4079 Massey-Harris Company

ASPR-3-202..... Massey-Harris Company

DA-04-200-ORD-11 Kenworth Motor Truck

DA-20-089-ORD-8406 Chrysler Corporation

DA-04-200-ORD-5..... Continental Aviation & Engineering

DA-04-200-ORD-6..... Food Machinery

DA-20-018-ORD-11276 Fisher Body Division

NOB(s)-2723..... Ingersoll Division

NOB(s)-2724..... Ingersoll Division

NOB(s)-2725..... Ingersoll Division

NOB(s)-2726..... Ingersoll Division

NOB(s)-2716..... Ingersoll Division

DA-20-018-ORD-11273 Ford Motor Company

NOB(s)-2813..... Continental Aviation & Engineering

NOB(s)-53598..... Continental Aviation & Engineering

NOA(3)42174..... Continental Aviation & Engineering

AF33(038)-23727..... Continental Aviation & Engineering

AF33(038)-8239..... Continental Aviation & Engineering

AF33(038)-12758..... Continental Aviation & Engineering

AF33(038)-25186..... Continental Aviation & Engineering

DA-20-089-ORD-20245 Continental Aviation & Engineering

DA-20-089-ORD-20250 Continental Aviation & Engineering

AF33(600)-5937..... Continental Aviation & Engineering

(2) When effected by servants, agents, or employees of the Contractor:

- (A) The net invoice cost of all direct materials required for repair, restoration, or rehabilitation.
- (B) Actual cost of transportation to the Contractor's plant of the required materials, provided, however, that no reimbursement shall be owing the Contractor hereunder when the invoice cost described in subparagraph (A) has included the cost of transportation.
- (C) The cost of all direct labor required for repair, restoration, or rehabilitation.
- (D) An amount equal to 75% of the cost set forth in subparagraph (C) above as an allowance for all overhead and administrative expense.

e. Installation of facilities acquired or manufactured hereunder, or furnished by the Government, when effected by servants, agents, or employees of the Contractor:

- (1) The net invoice cost of all direct materials required for installation.
- (2) Actual cost of transportation to the Contractor's plant of the required materials, provided, however, that no reimbursement shall be owing the Contractor hereunder when the invoice cost described in subparagraph (1) has included the cost of transportation.
- (3) The cost of all direct labor required for installation.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES
OF AMERICA

By /s/ Robert J. Bedell
Lt. Col., Ord. Corps
Contracting Officer
(Official Title)

Two Witnesses:

/s/ J. P. Koreck, Jr.
Detroit, Michigan
(Address)

/s/ A. O'Connor
Detroit, Michigan
(Address)

CONTINENTAL
MOTORS
CORPORATION
(Contractor)

By /s/ Clarence Reesé
President
Detroit, Michigan
(Business Address)

I, J. Sears, certify that I am the assistant secretary of the corporation named as contractor herein; that Clarence Reesé who signed this contract on behalf of the contractor was then President of said corporation; that said contract was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said corporation this 30th day of June 1952.

(Corporate
Seal)

SEAL

/s/ J. Sears
Asst. (Secretary) J. SEARS

- (4) An amount equal to 75% of the cost set forth in subparagraph (3) above as an allowance for all overhead and administration expense.
- f. For the installation of facilities acquired or manufactured hereunder or furnished by the Government, when effected by persons other than the servants, agents, or employees of the Contractor:

The net invoice cost to the Contractor of the installation.

- g. For necessary plant rearrangement, rehabilitation, and incidental construction, including any necessary services required prior to installation of Schedule "A" facilities or Schedule "B" facilities:

- (1) When effected by persons other than servants, agents, or employees of the Contractor:

The net invoice cost to the Contractor of plant rearrangement, rehabilitation, and incidental construction.

- (2) When effected by servants, agents, or employees of the Contractor:

- (A) The net invoice cost of all direct materials required for plant rearrangement, rehabilitation, and incidental construction.
- (B) Actual cost of transportation to the Contractor's plant of the required materials, provided, however, that no reimbursement shall be owing the Contractor hereunder when the invoice cost described in subparagraph (A) has included the cost of transportation.
- (C) The cost of all direct labor required for plant rearrangement, rehabilitation, and incidental construction.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry,

who signed this contract for the
had authority to execute the same, and is
the individual who signs similar contracts on behalf of
this corporation with the public generally.

(Contracting Officer)

EXHIBIT 4

CONTRACT NO. DA-20-018-ORD-13262
DEPARTMENT OF THE ARMY—
(ORDNANCE CORPS)
MASTER FACILITIES CONTRACT

CONTRACTOR: Continental Motors Corporation

ADDRESS: Detroit 14, Michigan

CONTRACT FOR: Facilities to Produce Various Military
Engines and Parts Therefor; Special Tooling; Price
Redetermination

TOTAL COST: \$0.00 (No Performance under Title I of
Part I provided at the time of execution hereof.)

PLACE: Detroit Ordnance District, Detroit 31, Michigan

PAYMENT: Invoice documents for deliveries made and/or
services performed under this contract should be billed
and sent to Department of the Army, Detroit Ordnance
District, 574 East Woodbridge Street, Detroit 31,
Michigan, Attention: Fiscal Branch, except as otherwise
provided herein. Payment will be made in accordance
with the terms of this contract by the Finance
Officer, U. S. Army, 6301 West Jefferson,
Detroit 17, Michigan.

ALLOTMENT: The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following allotment, the available balance of which is sufficient to cover payment for same:

ALLOTMENT	AMOUNT
(NO FUNDS INVOLVED AT THE TIME OF EXECUTION HEREOF BECAUSE NO PERFORMANCE UNDER TITLE I OF PART I PROVIDED AT SUCH TIME.)	

AUTHORIZATION: This contract is authorized and negotiated under Title II, First War Powers Act 1941, as amended, and Executive Order No. 10210 dated 2 February 1951.

CONTRACT NO. DA 20-018 ORD-13262

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- (D) An amount equal to 75% of the cost set forth in subparagraph (C) above as an allowance for all overhead and administrative expense.
- b. For dismantling, preparing for shipment or for storage, and loading facilities no longer required, in accordance with Parts 3 and 4 of Article V-A:

- (1) When effected by persons other than servants, agents, or employees of the Contractor:

The net invoice cost to the Contractor for dismantling, preparing for shipment or for storage, and loading.

- (2) When effected by servants, agents, or employees of the Contractor:

- (A) The net invoice cost of all direct materials required for dismantling, preparing for shipment or for storage, and loading.

- (B) The actual cost of transportation to the Contractor's plant of the required materials, provided, however, that no reimbursement shall be owing the Contractor hereunder when the invoice cost described in subparagraph (A) has included the cost of transportation.

- (C) The cost of all labor required for dismantling, preparing for shipment or for storage, and loading.

- (D) An amount equal to 75% of the cost set forth in subparagraph (C) above as an allowance for all overhead and administration expense.

- i. It is understood and agreed that hereafter at any time and from time to time, except as hereinafter provided, either the Government or the Contractor may deliver

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SCHEDULE "A"

SCHEDULE "B"

SCHEDULE "C"

EXHIBIT "A" STATEMENT OF FACTS
AND CIRCUMSTANCES

EXHIBIT "B" CONTRACTING OFFICER'S FINDINGS

This Contract entered into as of the 26th day of October, 1953, by and between THE UNITED STATES OF AMERICA, hereinafter called "the Government," represented by the Contracting Officer executing this contract, and CONTINENTAL MOTORS CORPORATION, a corporation organized and existing under the laws of the Commonwealth of Virginia, with offices located in the Cities of Detroit and Muskegon, in the State of Michigan, hereinafter called "the Contractor," pursuant to the provisions of Title II, First War Powers Act, 1941, as amended and Executive Order No. 10210 dated 2 February 1951, and pertinent appropriation acts;

WITNESSETH THAT:

WHEREAS, the Secretary of the Army had determined that it is necessary in the interest of national defense to provide Government facilities for the manufacture of various military engines and parts therefor; and

WHEREAS, there is in existence at this time certain supply contracts between the Government and the Contractor and certain subcontracts between Government Prime Contractors and the Contractor; and

WHEREAS, the successful performance of said contract and subcontracts requires the utilization and furnishing of Government property and facilities; and

WHEREAS, the Secretary of the Army desires to provide the property listed in the Schedules, attached hereto and made a part hereof, to the Contractor for the purpose

of the production of equipment and supplies for the Army for emergency defense purposes; and

WHEREAS, the provision of said property will facilitate the procurement of essential supplies and services, promote the national defense, and is deemed to be in the public interest; and

WHEREAS, pursuant to certain contracts between the parties hereto, the Government has furnished or the Contractor ~~has~~ acquired the property listed in the schedules which has established certain manufacturing capacities; and

WHEREAS, the parties hereto now desire to provide for all of such property in this contract, making uniform provisions therefor and maintaining the manufacturing capacities established thereby; and

WHEREAS, the parties hereto now desire to provide for the changing by the Contracting Officer hereunder of the drawings, designs, and specifications of the military engines and parts therefor, to the extent hereinafter provided, and for the equitable adjustment of such changes as well as for the Special Tooling generated or modified by reason thereof; and

WHEREAS, in consideration for the furnishing of said property by the Government, the Contractor has agreed that the Government and the Contractor may redetermine the prices for military engines and parts therefor charged by the Contractor, as hereinafter provided; and

WHEREAS, because of the facts and circumstances recited in Exhibit "A" attached hereto and made a part hereof, the Contracting Officer has found that the establishment of manufacturing capacities, by furnishing Government-Owned Property to the Contractor, a Sub-

contractor to various Government Prime Contractors, and to various Subcontractors of the Contractor, will facilitate the National Defense, all as recited in Exhibit "B" attached hereto and made a part hereof; and.

WHEREAS, the Assistant Secretary of the Army is authorized to approve, and has approved the execution of this Contract;

NOW, THEREFORE, it is mutually agreed as follows:

PART I—FACILITIES

TITLE I

ACQUISITION OR MANUFACTURE OF FACILITIES

ARTICLE I-A. PROCUREMENT OF FACILITIES.

1. The Contractor shall, in the shortest possible time, with the approval of the Contracting Officer, acquire (and repair or rehabilitate where necessary) for resale to the Government, or manufacture for sale to the Government, the machinery, equipment or other industrial facilities, hereafter in Title I referred to as the "facilities," listed in Schedule "A," attached hereto and expressly made a part hereof. Such facilities shall be installed by the Contractor in its plant or plants or, if approved in writing by the Contracting Officer, for use to the extent and in the manner required for the performance of this contract during its existence in the plants of first tier subcontractors. All such facilities installed in plants of Subcontractors will be operated and maintained in the same manner as the facilities located in the Contractor's own plant or plants, and the terms and conditions of this contract shall apply to such facilities. The Contractor shall insert provisions in all subcontracts under which such facilities are furnished to the subcontractors whereby there will be made applicable to the Government and the subcontractors substantially

the same rights and obligations in respect to such facilities as are made applicable to the Government and the contractor under this contract except as the Contracting Officer may otherwise authorize or direct.

2. The Contractor may, with the prior written approval of the Contracting Officer, substitute facilities similar to those in Schedule "A;" or may add additional facilities thereto from time to time as required during the course of the work, in which event Schedule "A" will be modified accordingly. Copy of all approved revisions or changes of said Schedule "A" shall be furnished the Contracting Officer so that, at all times, his copy of Schedule "A" will be current and include all approved modifications. A final revised Schedule "A" containing all modifications shall be incorporated in the contract by supplemental agreement hereto, upon completion of the work under Title I.

3. Title to all property purchased by the contractor, for resale to the Government, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract; shall pass to and vest in the Government upon delivery of such property by the vendor. Title to all property manufactured by the Contractor, for sale to the Government, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, or for which the Contractor is entitled to payment in accordance with Paragraph 1c of Article III-A hereof, shall pass to and vest in the Government upon delivery of such property by the Contractor. Title to all property furnished by the Government shall remain in the Government. Title to the Government property whether acquired by the Contractor for the account of the Government, or furnished by the Government, shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government prop-

erty or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty.

4. a. The Government reserves the right to furnish as Schedule "B" facilities, pursuant to Title II hereof, any additional equipment necessary, including any of the equipment listed as Schedule "A," and any such Schedule "B" facilities shall be held by the Contractor and considered and treated in the same manner as Schedule "A" facilities.

b. In the event the Government elects to furnish any items listed in Schedule "A," such items shall be deleted from Schedule "A," subject to Article I-C below, and added to Schedule "B."

5. The Contractor shall be free to use any facilities of its own manufacture, upon advising the Government in advance as to the prices and conditions upon which such facilities will be supplied. The Contractor shall charge the Government for such facilities the lowest price then currently charged by the Contractor to any other purchaser, including other divisions of the Contractor. Nothing contained herein shall be construed to require the Contractor to furnish at cost, equipment or standard facilities which it manufactures for commercial use or sale. In the event the Government is able to obtain any such facilities of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive sources or from its own manufacture, it may undertake to do so provided it so notifies the Contractor prior to any commitments or expenditures by Contractor therefor.

ARTICLE I-B. DIVERSION OF SCHEDULE "A" FACILITIES.

The Contracting Officer may direct the diversion of any item of Schedule "A" facilities to the Government or to any person designated by the Contracting Officer when

such items shall have been acquired or its manufacture shall have been completed. In the event of such diversion, the Government shall reimburse the Contractor for the actual costs of the item in accordance with the provisions of Article III-A of Title III with appropriate adjustment in the amount of reimbursable transportation costs. Upon diversion, such item will be eliminated from Schedule "A," and an equitable adjustment shall be made in the delivery or performance dates, or price or both, and in any other contractual condition of the related supply contracts. In no event shall the Government be liable to the Contractor for damages or loss of profit by reason of any such diversion.

ARTICLE I-C. ELIMINATION FROM SCHEDULE "A."

1. The Contracting Officer may determine at any time prior to installation of any item of Schedule "A" facilities, that such item is not reasonably necessary for the performance of this Contract or any related supply contracts. Notice of this determination will be furnished in writing by the Contracting Officer to the Contractor.
2. No later than thirty days after receipt of such notice, the Contractor will notify the Contracting Officer if any binding commitment has been made or expense incurred with respect to acquisition or manufacture of such item. In the event no binding commitment or expense has been incurred, with respect to acquisition or manufacture of such item, the item will be eliminated from Schedule "A," and the Government shall be relieved from any liability therefor.

3. In the event the Contractor has made a binding commitment or incurred expense therefor, the Contracting Officer may direct the Contractor to stop all further work and the making of any further commitments with respect

thereto. The Contractor and the Contracting Officer will attempt to agree on an amount which will reasonably and fully compensate the Contractor for costs incurred with regard to such item. Such agreement will be guided by the principles for reimbursability of costs set forth in Article III-A of Title III of this contract. If an agreement between the parties cannot be reached within thirty (30) days (or within such longer period as may be mutually agreed upon) the Contractor will be paid an amount determined pursuant to Article III-A of this contract, plus any termination charges of subcontractors and any termination expense of the Contractor in accordance with applicable termination regulations. In no event will the aggregate of reimbursement (and all payments previously made) exceed the actual cost as defined in Article III-A expended or incurred thereon up to the time of such elimination, plus any termination charges of subcontractors and any termination expense of the Contractor, in accordance with principles set forth in Section VIII of the Armed Services Procurement Regulation. The Contracting Officer, to the extent authorized by law, may permit the Contractor to sell or retain at prices or on terms agreed to by the Government, any materials, supplies, or work-in-process, and the proceeds of such sale, or such agreed prices shall be paid or credited to the Government in such manner as the Contracting Officer may direct. Upon payment to the Contractor in accordance with this provision, title to all materials, supplies, work-in-process, and other things for which payment is made (except such property as may be sold or retained as above provided) will vest in the Government.

ARTICLE I-D: ESTIMATES.

No performance under Title I of this Part I is required at the time of execution of this contract, no procurement of facilities being provided at such time; therefore, there is

no cost of the Contractor's performance under this Title I. It is contemplated that from time to time hereafter the parties hereto may, by appropriate Supplemental Agreement hereto, provide for such performance and estimates of, and funds for, the costs thereof.

ARTICLE I-E. CONSIDERATION.

As consideration for its undertaking under Title I, the Contractor shall receive reimbursement for expenditures as provided in Title III hereof. It is expressly understood that the Contractor shall be entitled to no fee or profit for the acquisition, manufacture, or installation of Schedule "A" or "B" facilities, except as to items which the Contractor manufactures for use or sale as provided in paragraph 5 of Article I-A.

TITLE II

GOVERNMENT-FURNISHED PROPERTY

ARTICLE II-A. DELIVERY.

1. The Government shall furnish to the Contractor the facilities described in Schedule "B" and the tooling described in Schedule "C," both of which are attached hereto and expressly made a part hereof, for use in the performance of certain supply contracts, identified in Article IV-A hereof. The Government shall deliver, or has already delivered, such Schedule "B" facilities and Schedule "C" tooling at the time or times stated in such schedules or if not so stated in sufficient time to enable the Contractor to perform the affected supply contract(s). If any such facilities are not delivered to the Contractor by such time or times, or are delivered in such condition as to require repair or rejection pursuant to the provisions of paragraphs 2 and 3 of this article, the appropriate Contracting Officer, upon written request of the Contractor, may equitably adjust the price, the time of performance, and other

terms and conditions of the affected supply contract(s). In no event shall the Government be liable to the Contractor for damages or loss of profit by reason of any delay in or failure to deliver any or all of the items set forth in Schedule "B" or for delivery of such items not in satisfactory operating condition or not of a suitable type.

2. In the event Schedule "B" items furnished for the first time hereunder are not in fit operating condition, the Contractor shall repair, restore, or rehabilitate such equipment so as to make it serviceable or fit for use (cost connected with such repairs, restoration, or rehabilitation shall be reimbursed to the Contractor under this contract).

3. The Contractor, with the written approval of the Contracting Officer, may reject any Schedule "B" facilities furnished for the first time hereunder which are not of a suitable type or not in fit operating condition or are not reasonably capable of being restored, repaired, or rehabilitated so as to make them serviceable (cost connected with receiving, inspecting, rejecting, and returning such facilities shall be reimbursed to the Contractor under this contract).

4. It is contemplated by the parties hereto that there may be added to Schedules "B" and "C" hereof from time to time additional facilities and lots of tooling acquired or manufactured by the Contractor pursuant to other contracts between the parties hereto.

ARTICLE II-B. INSTALLATION.

The facilities and tooling under this title shall be installed or used by the Contractor in its plant or plants or, if approved in writing by the Contracting Officer, for use to the extent and in the manner required for the performance of this contract during its existence in the plants of subcontractors. All such facilities and tooling installed

or used in plants of subcontractors will be operated and maintained in the same manner as the facilities and tooling located in the Contractor's own plant or plants, and the conditions of this contract shall apply to such facilities and tooling. The Contractor shall insert provisions in all subcontracts under which such facilities are furnished to the subcontractors whereby there will be made applicable to the Government and the subcontractors substantially the same rights and obligations in respect to such facilities as are made applicable to the Government and the Contractor under this contract except as the Contracting Officer may otherwise authorize or direct.

ARTICLE II-C. TITLE

Title to all property furnished by the Government shall remain in the Government. Title to the property furnished by the Government shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty.

TITLE III

COST OF THE WORK UNDER PART I AND PAYMENT THEREFOR

ARTICLE III-A. REIMBURSEMENT FOR CONTRACTOR'S EXPENDITURES.

I. For the performance of the work called for under Part I of this contract; the Government shall pay to the Contractor the costs and expenditures determined to be allowable in accordance with Section XV, Armed Services Procurement Regulation as in effect on the date of this contract (such section being hereby incorporated by reference in and made a part of this contract) for the following:

to the other a written demand that the parties negotiate to revise any or all of the percentage amounts, representing allowances for overhead and administrative expense, set forth in parts d (2) (D), e (4), g (2) (D) (and h (2) (D) of this Article III A 1. No such demand shall be made before ninety days from the date of this contract; however, and thereafter neither party shall make a demand having an effective date within ninety days of the effective date of any prior demand. Each demand shall specify a date (identical with or subsequent to the date of delivery of the demand) as to which the revised percentage amount(s) shall be effective as to services performed thereon and thereafter. In the event the parties are unable to agree as to the revised amount(s) of such percentage(s), such failure to agree shall be considered a dispute under the article hereof entitled "Disputes." The Contractor represents, based on experience that the presently specified percentage amounts do not include any element of profit and represent no more than actual costs allocable hereto.

2. General.

- a. The Government reserves the right to pay directly to common carriers any and all transportation charges on materials, machinery, or equipment.
- b. The Contractor agrees that, to the extent of its ability, it shall take advantage of all benefits accruing to it in the performance of this contract, such as cash and trade discounts, allowances, salvage, commissions, and bonifications, and further the Contractor agrees that any refunds, recoveries, rebates, or credits, including in each instance interest thereon if applicable, accruing to or received by the Contractor or its assignee which arise out of perform-

ance of this contract and on account of which the Contractor has received reimbursement, shall be paid by the Contractor to the Government or credited as directed by the Contracting Officer. When unable to take advantage of any such benefits, it shall, if requested by the Contracting Officer, justify such failure by a statement of the reasons therefor. If not otherwise paid to the Government, the Contracting Officer, in determining the actual net cost of articles, materials, and/or services of every kind required for the purpose of this contract shall cause to be deducted from the gross cost thereof all benefits or advantages as hereinabove provided, which have accrued to the Contractor or would have so accrued except for the fault or neglect on the part of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, including discounts not taken because facilities were not received and accepted, or lost through fault of the Government shall not be deducted from gross costs.

c. The Contractor agrees that any amount or amounts in excess of any applicable ceiling price established by the office of Price Stabilization or any other authorized Government agency shall not constitute allowable cost under this Contract.

ARTICLE III-B. RECORDS.

(a) (1) The Contractor agrees to maintain books, records, documents and other evidence pertaining to the costs and expenses of this contract (hereinafter collectively called the "records") to the extent and in such detail as will properly reflect all net costs, direct and indirect, of labor, materials, equipment, supplies and services, and other costs and expenses of whatever nature for which reimbursement is claimed under the provisions of this contract. The Contractor's accounting procedures and practices shall be subject to the approval of the Contracting

Officer; provided, however, that no material change will be required to be made in the Contractor's accounting procedures and practices if they conform to generally accepted accounting practices and if the costs properly applicable to this contract are readily ascertainable therefrom.

(2) The Contractor agrees to make available at the office of the Contractor at all reasonable times during the period set forth in subparagraph (4) below any of the records for inspection, audit or reproduction by any authorized representative of the department or of the Comptroller General.

(3) In the event the Comptroller General or any of his duly authorized representatives determines that his audit of the amounts reimbursed under this contract as transportation charges will be made at a place other than the office of the Contractor, the Contractor agrees to deliver, with the reimbursement voucher covering such charges or as may be otherwise specified within two years after reimbursement of charges covered by any such voucher, to such representative as may be designated for that purpose through the Contracting Officer such documentary evidence in support of transportation costs as may be required by the Comptroller General or any of his duly authorized representatives.

(4) Except for documentary evidence delivered to the Government pursuant to subparagraph (3) above, the Contractor shall preserve and make available its records for a period of six years (unless a longer period of time is provided by applicable statute) from the date of the voucher or invoice submitted by the Contractor after the completion of the work under the contract and designated by the Contractor as the "completion voucher" or "completion invoice" or, in the event this contract has been completely terminated, from the date of the termination

settlement agreement; provided, however, that records which relate to (a) appeals under the clause of this contract entitled "Disputes," (b) litigation or the settlement of claims arising out of the performance of this contract, or (c) costs or expenses of the contract as to which exception has been taken by the Comptroller General or any of his duly authorized representatives shall be retained by the Contractor until such appeals, litigation, claims, or exceptions have been disposed of, but in no event for less than the six-year period mentioned above.

(5) Except for documentary evidence delivered pursuant to subparagraph (3) above, and the records described in the provision of subparagraph (4) above, the Contractor may in fulfillment of its obligation to retain its records as required by this clause substitute photographs, micro-photographs or other authentic reproductions of such records, after the expiration of two years following the last day of the month of reimbursement to the Contractor of the invoice or voucher to which such records relate, unless a shorter period is authorized by the Contracting Officer with the concurrence of the Comptroller General or his duly authorized representative.

(6) The provisions of this paragraph (a), including this subparagraph (6), shall be applicable to and included in each subcontract hereunder which is on a cost, cost-plus-a-fixed-fee, time-and-material or labor-hour basis.

(b) The Contractor further agrees to include in each of his subcontracts hereunder, other than those set forth in subparagraph (a) (6) above, a provision to the effect that the subcontractor agrees that the Comptroller General or the Department, or any of their duly authorized representatives, shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, document, papers,

and records of such subcontractor involving transactions related to the subcontract. The term "subcontract," as used in this paragraph (b) only, excludes (i) purchase orders not exceeding \$1,000 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

ARTICLE III-C. PAYMENTS.

1. *Payments by Government.* Upon presentation of properly certified invoices or vouchers or other evidence of payment satisfactory to the Contracting Officer, the Contractor shall be reimbursed in accordance with Title III hereof. Vouchers for payment under this contract will be prepared by the Contractor and submitted to the agency having audit cognizance, transmitted by the cognizant audit agency to the Contracting Officer for certification; and submitted by the Contracting Officer to the Finance Officer, U. S. Army, 6301 West Jefferson Avenue, Detroit 17, Michigan, for payment.

2. *Final Payment.* Upon completion of the work pursuant to Title I and final acceptance thereof in writing by the Contracting Officer, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Title III hereof, less any sum that may be necessary to settle any claim in connection with this contract which the Government may have against the Contractor. The Contracting Officer shall accept or reject the completed work with reasonable promptness. Prior to final payment and as a condition thereto, the Contractor shall furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release.

TITLE IV

TERMS AND CONDITIONS GOVERNING THE USE
OF FACILITIES

ARTICLE IV-A. USE OF FACILITIES.

1. Subject to the terms and conditions hereinafter set forth, the Government hereby grants the Contractor the right to use the items set forth on Schedule "A," Schedule "B," and Schedule "C," hereinafter referred to as facilities, for the production of various military engines and parts therefor under those Government contracts and subcontracts with Government Contractors (which contracts and subcontracts are herein referred to as "related supply contracts") as may be authorized by the Contracting Officer without the payment of rental therefor. The Contractor hereby agrees that no part of the cost of such facilities in the form of depreciation or amortization has been or will be included in the price of the end items under the related supply contracts for which such facilities have been authorized for use.
2. Subject to the time and conditions hereinafter set forth, the Government hereby also grants the Contractor the right to use and occupy the land, buildings, improvement, installation, and appurtenances thereunto belonging, set forth in Schedule "B" hereof, located in the Township of Muskegon, State of Michigan, sometimes known as Plancor-166-M, subject to the following additional rights, duties and obligations:
 - a. The Contractor, during the continuance of its rights to use Plancor-166-M, shall procure, pay for, and maintain insurance policies on Plancor-166-M of types and in amounts as the Contracting Officer from time to time may direct in writing.

b. The Contractor agrees to pay all proper claims or charges for or on account of water, light, heat, power, or any other services or utilities furnished to or with respect to Plancor-166-M.

c. The Contractor agrees that it shall not make any structural alterations to said Plancor-166-M except with the prior written approval of the Contracting Officer.

d. It is understood and agreed that major repairs to structural parts of the buildings or to major items of building equipment of Plancor-166-M shall be deemed to be not required by sound industrial practices within the meaning of Part I (iv) (A) of Article IV-H of this Part I. It is further understood and agreed that written directions or instructions of the Contracting Officer with regard to such major repairs, within the meaning of Part I (iv) (B) of Article IV-H, shall be given only in the Supplemental Agreement contemplated by Article IV-C of this Part I.

e. Any termination of the Contractor's right to use and occupy Plancor-166-M shall be deemed an act of the Government within the meaning of any excusable delay provision in any contract the Contractor may have with the Government and shall be deemed a termination for the convenience of the Government of any such contract (or any subcontract under a prime contract with the Government) which cannot be completed because of such termination of the Contractor's right to use and occupy Plancor-166-M.

ARTICLE IV-B. IDENTIFICATION AND MARKING.

The Contractor shall without cost to the Government hereunder, maintain a marking and identification system in accordance with the provisions set forth in the "Manual for Control of Government Property in Possession of Contractors," in effect as of the date of this contract, and shall be subject to the provisions of said manual. The Contractor agrees to follow the Contracting Officer's instructions in

this regard. The Government shall have the right to enter the Contractor's premises at reasonable times to inspect the records and identifications required under this article. Nothing in this article shall limit the Contractor's rights with respect to costs properly allocable under other contracts.

ARTICLE IV-C. MAINTENANCE AND PRESERVATION.

The Contractor shall, without cost to the Government hereunder (except as otherwise herein elsewhere provided), maintain a program for the protection, preservation, maintenance, and repair of all facilities in accordance with sound industrial practice so as to insure its full availability and usefulness during the course of this contract; provided however, that the Government shall reimburse the Contractor for the reasonable cost of all repairs, replacements, and restoration measures which are in excess of normal requirements for maintenance or in excess of fair wear and tear, when such repairs, restoration, and replacements are directed or approved by the Contracting Officer unless the Contractor is liable for such costs under Article IV-H hereof. Prior to the commencement of such repairs, replacements, or restoration measures (for which the Contractor is not liable under Article IV-H hereof), the parties will negotiate a supplemental agreement to this contract providing for the reimbursement to the Contractor by the Government of the reasonable cost thereof. Nothing in this article shall limit the Contractor's rights with respect to costs properly allocable under other contracts.

ARTICLE IV-D. WITHDRAWAL OF FACILITIES.

Items of facilities shall remain in the possession of the Contractor or its subcontractors as provided for in Article IV-A of Title IV for such period of time as is required for the performance of related supply contract(s) unless the

Contracting Officer determines that the best interest of the Government requires removal of any or all items. In such cases, the Contracting Officer may direct the dismantling, removal, and shipment of the property: Reimbursement shall be in accordance with the provisions of Article V-A of Title V. An equitable adjustment shall be made in the delivery of performance dates, or price, or both, and in any other contractual condition of the related supply contracts affected thereby. In no event shall the Government be liable to the Contractor for damage or loss of profit by reason of such removal.

ARTICLE IV-E. FILING OF INSTRUMENT.

Upon demand by the Contracting Officer, the Contractor shall cause a copy of this contract, including any attachments thereto as may be designated by the Contracting Officer, to be filed in accordance with the provisions of any applicable state law to the end that the Government's title to said equipment shall be fully protected; provided, that if this contract includes classified material, only such part of parts thereof as shall be indicated by the Contracting Officer shall be so filed or recorded. The cost of such filing or recording shall be reimbursed under the provisions of Title III hereof.

ARTICLE IV-E. TERMINATION OF RIGHT TO USE.

1. The right of the Contractor to use the facilities under this contract may be terminated by the Government in accordance with this article, in whole or in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a written notice of termination specifying the extent to which such right to use the facilities has been terminated and the date upon which such termination becomes

effective. An equitable adjustment shall be made in the delivery or performance dates or price, or both, and in any other contractual condition of the related supply contracts affected thereby. In no event shall the Government be liable for damages or loss of profit by reason of the termination of such right to use such facilities.

2. The Contractor shall have the right to terminate the contract any time upon 60 days notice, with respect to all such facilities covered thereby or, by agreement with the Contracting Officer, with respect to a substantial portion of such facilities. Termination at the option of the Contractor shall not relieve the Contractor of any of its obligations or liabilities under any supply or service contract affected thereby or any rights of the Government with respect to provision in this contract relating to retention or storage.

ARTICLE IV-C: GENERAL.

1. The Contractor shall procure all necessary permits and licenses, obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the state, territory, or subdivisions thereof wherein the work is done, or of any duly constituted public authority.

2. The Contractor agrees to pay to the proper authority, when and if the same become due and payable, all applicable taxes, assessments, and similar charges which at any time during the term of this contract may be lawfully taxed, assessed, or imposed upon the Contractor with respect to the facilities or any part thereof. The Government agrees to reimburse the Contractor for the amount of any taxes and assessments, including unavoidable interest and penalties when delay in payment of such taxes from the original due date was caused by the specific written instructions of the Contracting Officer.

3. The Contractor shall at all reasonable times keep at the site of the work a duly authorized representative who shall receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may issue under the terms of this contract.
4. The Contractor shall hold the Government harmless and shall indemnify the Government against claims for injury to persons or damage to property of the Contractor or others arising from the Contractor's possession or use of the facilities furnished hereunder, provided, however, that so long as there is in effect one or more contracts for supplies or services which require the use of such facilities, the provisions of such contracts shall govern the assumption of liability for such claims arising out of or related to the performance of each such contract and involving the possession or use of such facilities.
5. The Contracting Officer or his duly authorized representative shall have access at all times to the plant where the Government-owned facilities are located, for the purpose of inspection or inventorying same or for the purpose of removing same in the event of completion or termination of the contract.
6. Within thirty (30) days after any facility is determined by the Contractor to be lost, damaged, destroyed, no longer usable, or no longer needed for the performance of Government contracts, the Contractor shall notify the Contracting Officer thereof. Disposition of such damaged, destroyed, no longer usable, or no longer needed facilities will be in accordance with instructions of the Contracting Officer.

ARTICLE IV-H. LIABILITY FOR FACILITIES.

1. The Contractor shall not be liable for any loss or damage to the facilities or for expenses incidental to such

loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto) :

- (i) which results from risk expressly required to be insured under the facilities contract, but only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater;
- (ii) which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of said insurance or reimbursement;
- (iii) which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives, who has supervision or direction of (A) all or substantially all of the Contractor's business, or (B) all or substantially all of the Contractor's operations at the facility if such facility is a complete plant or unit, or (C) all or substantially all of the Contractor's operations at any one plant or separate location in which such facilities are installed or located, or (D) any separate or complete major industrial operation in connection with which the facilities are used; or
- (iv) which results from a failure on the part of any of the Contractor's directors, officers, or other representatives mentioned in (iii) above, (A) to maintain and administer, in accordance with sound industrial practices, a program for the maintenance, repair, protection, and preservation of the facil-

ties, so as to insure their full availability and usefulness at all times, or (B) to take all reasonable steps to comply with any appropriate written directions or instructions which the Contracting Officer may prescribe as reasonably necessary for the protection of the facilities; provided, that, with respect to any such loss or damage caused by the excepted peril, the Contractor shall be liable under this subparagraph (iv) only where such failure of the Contractor's representative, as set forth herein, results from his willful misconduct or lack of good faith. As used herein, the term "excepted peril" shall mean any peril set forth below:

- (I) Fire; lightning; windstorm, cyclone, tornado, hail; explosion; riot, riot attending a strike, civil commotion; vandalism and malicious mischief; sabotage; aircraft or objects falling therefrom; vehicles running on land or tracks, excluding vehicles owned or operated by the Contractor or any agent or employee of the Contractor; smoke; sprinkler leakage; earthquake or volcanic eruption; flood, meaning thereby rising of a body of water; hostile or warlike action, including action in hindering, combating, or defending against an actual, impending or expected attack by any Government or power (de jure or de facto), or by any authority using military, naval, or air forces, or by an agent of any such Government, power, authority, or forces; or
- (II) Other peril, of a type not listed above, if such other peril is customarily covered by insurance (or by a reserve for self-insurance) in accordance with the normal practice of the

Contractor, or the prevailing practice in the industry in which the Contractor is engaged with respect to similar property in the same general locale.

The perils as set forth in (I) and (II) above are herein-after called "excepted perils."

2. The Contractor represents that is not including in the price hereunder, and agrees that it will not hereafter include in any price to the Government, any charges or reserve for insurance (including self-insurance funds or reserves) covering loss or destruction of or damage to the Government-furnished property caused by any excepted peril, except for and to the extent insurance may be procured pursuant to the direction of the Contracting Officer.

3. Upon the happening of loss or destruction of or damage to any Government-furnished property caused by an excepted peril, the Contractor shall notify the Contracting Officer thereof, and shall communicate with the Loss and Salvage Organization, if any, now or hereafter designated by the Contracting Officer, and with the assistance of the Loss and Salvage Organization so designated (unless the Contracting Officer has directed that no such organization be employed), shall take all reasonable steps to protect the Government-furnished property from further damage, separate the damaged and undamaged Government-furnished property, put all the Government-furnished property in the best possible order, and furnish the Contracting Officer a statement of: (A) the lost, destroyed and damaged Government-furnished property, (B) the time and origin of the loss, destruction or damage, (C) all known interests in commingled property of which the Government-furnished property is a part, and (D) the insurance, if any, covering any part of or interest in such commingled prop-

erty. The Contractor shall be reimbursed for the expenditures made by it in performing its obligations under this subparagraph 3, (including charges made to the Contractor by the Loss and Salvage Organization, except any of such charges the payment of which the Government has, at its option, assumed directly), to the extent approved by the Contracting Officer and set forth in a Supplemental Agreement.

4. With the approval of the Contracting Officer after loss or destruction of or damage to Government-furnished property, and subject to such conditions and limitations as may be imposed by the Contracting Officer, the Contractor may, in order to minimize the loss to the Government or in order to permit resumption of business or the like, sell for the account of the Government any item of Government-furnished property which has been damaged beyond practicable repair, or which is so commingled or combined with property of others, including the Contractor that separation is impracticable.

5. Except to the extent of any loss or destruction of or damage to Government-furnished property for which the Contractor is relieved of liability under the foregoing provisions of this clause, and except for reasonable wear and tear or depreciation, or the utilization of the Government-furnished property in accordance with the provisions of this contract, the Government-furnished property (other than property permitted to be sold) shall be returned to the Government in as good condition as when received by the Contractor in connection with this contract.

6. In the event the Contractor is reimbursed or compensated for any loss or destruction of or damage to the Government-furnished property caused by an excepted peril, it shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's

rights to recover against third parties for any such loss, destruction or damage and, upon the request of the Contracting Officer, shall at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

TITLE V DISPOSITION OF FACILITIES

ARTICLE V-A. DISMANTLING AND REMOVAL.

1: Whenever it is determined that all or any part of the facilities are no longer required in the performance of the Contractor's prime or subcontract for which the facilities have been authorized for use or upon termination in accordance with Article IV-F of Title IV, the Contractor agrees that such facilities will be retained in accordance with Article V-B. The Contracting Officer may at that time or subsequently direct removal of the facilities from the Contractor's plant or subcontractor's plant, as the case may be, by written notice of the intention to remove such facilities. Within the shortest practicable time after (a) service of notice under this paragraph, or (b) the completion or termination of the retention period prescribed by Article V-B, provided no storage period arises, or (c) the completion or termination of the storage period described by Article V-C, but in no event later than thirty (30) days thereafter unless a longer time is agreed to by the parties, the Contractor will dismantle, prepare for shipment, and load the facilities affected on a common carrier at the Contractor's plant in accordance with instructions furnished by the Contracting Officer. In the event no instructions are furnished, dismantling and preparation for shipment shall be in accordance with sound industrial practice.

2. Prior to the commencement of the work of dismantling and preparing for shipment or for storage, the parties shall negotiate a supplemental agreement to this contract or a separate contract providing for the payment of a fixed sum or sums agreed upon, representing a reasonable and fair reimbursement of actual costs to be incurred in dismantling and preparing the facilities for shipment and the loading and shipping of such facilities on a common carrier; or the parties may proceed in accordance with part 3 of this Article V-A.

3. From time to time hereafter the Contracting Officer may issue instructions for dismantling, preparing for shipment or storage, and loading, on WD AGO FORM 653, "Shipping Order." Such Shipping Order(s) shall be numbered and dated and shall make reference to the terms of this contract. Such Shipping Order(s) shall set forth the facilities affected thereby and the method of preparation therefor. The Contractor agrees that upon acting pursuant to such Shipping Order(s), it will be bound by the terms thereof and will not exceed the estimated cost set forth therein. Shipping Order(s) pursuant to which the Contractor does not elect to act will be returned promptly to the Contracting Officer, and the parties shall proceed in such event in accordance with Part 2 of this Article V-A or in accordance with this Part 3 if a satisfactory amended Shipping Order is issued. Costs incurred in acting pursuant to such Shipping Orders will be reimbursed from funds cited thereon in accordance with Part 1 h of Article III-A hereof. The Contractor shall be paid in accordance with the procedure set forth in Article III-C hereof.

4. It is understood, however, that the obligations of the Contractor and any payment to the Contractor under this Article V-A are contingent upon the availability of funds for such purpose. Supplements to this contract or

separate contracts, entered into pursuant to Part 2 of this Article V-A, or Shipping Order(s) issued pursuant to Part 3 of this Article V-A, shall themselves be evidence of the availability of funds for the purpose stated and in the amounts set forth therein. Any failure to agree upon the fixed sum or sums representing reasonable and fair reimbursement of actual costs to be incurred, or upon the actual costs incurred in the performance of the work within the scope of this article shall be deemed a dispute under the article of this contract entitled "Disputes." Upon notification from the Contractor that the facilities are ready for shipment and are loaded on board common carrier the Government shall furnish additional shipping instructions, if necessary.

ARTICLE V-B. RETENTION AND DISPOSITION.

In the event a determination is made as provided in Article V-A that any or all facilities are no longer required in the performance of the Contractor's prime contracts or subcontracts for which the facilities have been authorized for use, and the Contracting Officer has not directed the removal of such facilities from the Contractor's plant the Contractor hereby agrees that such facilities shall be retained in the plant for a period of 90 days except that such facilities may be stored elsewhere by the Contractor if the Contractor requires use of the plant for production. Such facilities shall be retained or stored in such a manner that they can be reinstalled in the production line within a reasonable time and shall be adequately protected against the elements and deterioration, other than normal wear and tear. At the time the facilities are so retained or stored, the parties shall negotiate a supplemental agreement to this contract providing for payment to the Contractor of a sum or sums agreed upon as representing reasonable expenses of such retention of storage, or, by a supplemental

agreement, the Contractor may be reimbursed for the actual costs incurred. It is understood, however, that any payment to the Contractor under this article is contingent upon the availability of funds for such purpose and that if funds are not available for such purpose the Contractor is under no obligation to perform the work within the scope of this article.

1. The Contractor shall be under no obligation to retain the facilities during any period that the Contractor does not have control of and right to use the premises commonly known as "Plancor-166-M."
2. Any obligation of the Contractor to retain facilities pursuant to this article may be satisfied by retaining the same at said Plancor-166-M.
3. The cost of dismantling, preparing for shipment or storage and loading any facilities from locations other than Plancor-166-M preparatory to storing same at Plancor-166-M, shall be negotiated or reimbursed in accordance with Parts 2 or 3 of Article V-A hereof.
4. Any failure to agree upon the fixed sum or sums representing reasonable and fair reimbursement of actual costs to be incurred, or upon the actual costs incurred in the performance of the work within the scope of this article, shall be deemed a dispute under the article of this contract entitled "Disputes."

ARTICLE V-C. STORAGE.

Unless a notice pursuant to Article V-A is sooner received, the Contractor shall, for a period of six months after completion of the storage period, store the facilities as follows:

- a. In the plant where the items are then located or in the Contractor's other plants in the same locality, if space is available thereat and storage will not materially impair

the use of the plant or plants for the Contractor's Government or commercial work, or at any place or places in the vicinity selected by the Contractor which will be satisfactory to the Contracting Officer.

b. In the event such other place or places cannot be obtained by the Contractor, then the Government shall be responsible to find and designate a place or places of storage.

At the time the facilities are placed in storage, the parties shall negotiate a supplemental agreement to this contract providing for payment to the Contractor of a sum or sums agreed upon as representing reasonable expenses for placing and maintaining the facilities in storage. The Contractor's obligation with respect to storage shall be contingent upon the availability of appropriated funds for payment of storage costs, and if appropriated funds are not available, the Contractor shall be under no such obligation, and the Government shall undertake the full responsibility of storage. The Contractor shall be under no obligation to store the facilities during any period that the Contractor does not have control of or right to use the premises commonly known as "Plancor-166-M." Any obligation of the Contractor to store facilities pursuant to this article may be satisfied by storing the same at said Plancor-166-M. Any failure to agree upon the fixed sum or sums representing reasonable and fair reimbursement of actual costs to be incurred, or upon the actual costs incurred, in the performance of the work within the scope of this article, shall be deemed a dispute under the article of this contract entitled "Disputes."

ARTICLE V-D. CHANGE OF RETENTION OR STORAGE PERIOD.

The ninety (90) day retention or storage period and the six month storage period may be eliminated, shortened, or

lengthened by agreement of the parties on mutually agreeable terms.

ARTICLE V-E. SHUTDOWN.

At any time prior to the surrender by the Contractor to the Government of Plancor-166-M and the other facilities covered hereby, the Contracting Officer may give written notice to the Contractor that the Government desires the Contractor to do one or more of the following:

- (i) Prepare all or certain of the items of machinery equipment and special tooling for storage;
- (ii) Place Plancor-166-M in a "shutdown" condition;
- (iii) Furnish guard services;
- (iv) Protect, preserve, and store the facilities so that the same may be made readily available for the uses for which they were acquired; and
- (v) Take such steps with respect to the care and custody of Plancor-166-M and the other facilities and special tooling covered hereby as the Government may direct.

If such notice is given, the Contractor agrees to negotiate in good faith with the Government for an agreement covering the duties and responsibilities of the Contractor in respect of the work to be performed and the compensation to be paid to the Contractor therefor. Any agreement reached pursuant to this Article V-E shall be reduced to writing in the form of a separate contract or as a supplement to this agreement.

ARTICLE V-F. RECONVERSION, RESTORATION, AND ALTERATIONS COSTS.

The parties hereto recognize that the installation of the facilities provided hereunder may require alterations or modifications in the Contractor's plant or plants. The parties further recognize that the removal of the facilities fur-

nished hereunder may result in incidental structural damage to the Contractor's plant. Accordingly, where it is necessary to remove or modify such alterations or where incidental structural damage is a direct result of dismantling and preparation for shipment, the Government agrees to reimburse the Contractor for the reasonable costs of the removal or modification of such alterations and of the repairs of such incidental structural damage. Any failure to agree as to such costs shall be deemed dispute under the article hereof entitled "Disputes."

ARTICLE V-G. MODIFICATION OF SCHEDULE "C" TOOLING

It is understood and agreed that items of tooling listed on Schedule "C" have been or may hereafter be modified, have or may become obsolete, or have or may become otherwise unusable from time to time. In addition, replacement tooling may be generated from time to time in order that the Contractor may maintain the production capacities described in Schedule "C." It is understood and agreed that notwithstanding any provision of this Part I to the contrary, the Contractor's obligation with regard to such tooling under this Part I, at the termination or completion hereof, shall be to return to the Government tooling, as the same may be modified, capable of producing military engines and parts therefor in accordance with the capacities described in Schedule "C." The Contractor shall inform the Contracting Officer and provide lists (as directed by the Contracting Officer) showing modifications, obsolescence, and replacements as they occur from time to time during this contract.

TITLE VI

OTHER PROVISIONS APPLICABLE TO PART I

ARTICLE VI-A. DISPUTES.

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this con-

tract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; *provided* that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

ARTICLE VI-B. NONDISCRIMINATION IN EMPLOYMENT.

In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin; and further agrees to insert the foregoing provision in all subcontracts hereunder except subcontracts for standard commercial supplies or for raw materials.

ARTICLE VI-C. OFFICIALS NOT TO BENEFIT.

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but

this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE VI-D. COVENANT AGAINST CONTINGENT FEES.

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, or brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE VI-E. EIGHT-HOUR LAW

This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (40 U. S. Code 324-326) and is not covered by the Walsh-Healey Public Contracts Act (41 U. S. Code 35-45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912 as amended, and to all other provisions and exceptions of said Law:

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of the said work, shall be required or permitted to work more than the eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every such laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this con-

tract shall be computed on a basic day rate of eight hours per day; and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed upon the Contractor for each such laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause; and all penalties thus imposed shall be withheld for the use and benefit of the Government.

ARTICLE VI.F. ASSIGNMENT OF CLAIMS.

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U. S. Code 203, 41 U. S. Code 15), if this contract provides for payments aggregating \$1,000.00 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any other provision of this contract, payments to an assignee of any moneys due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off.

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," "Confidential," or "Restricted," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same; provided that a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

ARTICLE VI-G. CONVICT LABOR.

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

ARTICLE VI-H. BUY AMERICAN ACT.

The Contractor agrees that there will be delivered under this contract only such unmanufactured articles, materials, and supplies (which term "articles, materials, and supplies" is hereinafter referred to in this clause as "supplies") as have been mined or produced in the United States, and only such manufactured supplies as have been manufactured in the United States substantially all from supplies mined, produced, or manufactured, as the case may be, in the United States. Pursuant to the Buy American Act (41 U. S. Code 10a-d), the foregoing provision shall not apply (i) with respect to supplies excepted by the Secretary from the application of that Act, (ii) with respect to supplies for use outside the United States, (iii) with respect to the supplies to be delivered under this contract which are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonable available commercial quantities and of a satisfactory quality or (iv) with respect to such

supplies, from which the supplies to be delivered under this contract are manufactured, as are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonable available commercial quantities and of a satisfactory quality, provided that this exception (iv) shall not permit delivery of supplies manufactured outside the United States if such supplies are manufactured in the United States in sufficient and reasonable available commercial quantities and of a satisfactory quality.

ARTICLE VI-I. RECORDS OF GOVERNMENT-OWNED PROPERTY.

The Contractor shall maintain adequate property control records of Government-owned real property and the Government shall maintain adequate property control records of all other Government-furnished property, all in accordance with the provisions of the "Manual for Control of Government Property in Possession of Contractors," "Appendix B" of ASPR XIII, in effect as of the date of this contract, incorporated herein by reference and made a part hereof.

ARTICLE VI-J. SUBCONTRACTS.

1. The Contractor shall give advance notification to the Contracting Officer of any proposed subcontract hereunder which (i) is on a cost or cost-plus-a-fixed-fee basis, or (ii) is on a fixed-price basis exceeding in dollar amount either \$25,000 or five percent (5%) of the total estimated cost of this contract.
2. The Contractor shall not place any subcontract without the prior written consent of the Contracting Officer which (i) is on a cost or cost-plus-a-fixed-fee basis, or (ii) is on a fixed-price basis exceeding in dollar amount either

\$25,000 or five percent (5%) of the total estimated cost of this contract, or (iii) is on a time-and-material or labor-hour basis. The Contracting Officer may, in his discretion, ratify in writing, any such subcontract; such action shall constitute the consent of the Contracting Officer as required by this paragraph 2.

3. The Contractor agrees that no subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis.

4. The consent of the Contracting Officer obtained as required by this clause shall in no way relieve the Contractor of any of its obligations assumed under this contract, nor shall it be construed to constitute a determination of the allowability of any cost under this contract which would not be allowable if such consent were not required.

5. The Contractor shall give the Contracting Officer immediate notice in writing of any action or suit filed, or any claims made against the Contractor by any subcontractor or vendor, related in any way to this contract with respect to which the Contractor may be entitled to reimbursement from the Government.

ARTICLE VI-K. GRATUITIES.

1. The Government may, by written notice to the Contractor, terminate the right of the contractor to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such contract; pro-

vided that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

2. In the event this contract is terminated as provided in paragraph 1 hereof, the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages of which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than 3 nor more than 10 times the costs incurred by the Contractor in providing any such gratuities to any officer or employee.

3. The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law under this contract.

ARTICLE VI-L REPORTING OF ROYALTIES.

If this contract is in an amount which exceeds \$10,000, the Contractor agrees to report in writing to the Contracting Officer, during the performance of this contract and prior to its completion or final settlement, the amount of any royalties or royalty rates paid or to be paid by it directly to others in connection with the performance of this contract, together with the names and addresses of licensors to whom such payments are made and either the patent numbers involved or such other information as will permit identification of the patents or other basis on which royalties are to be paid. Where the Contractor's compliance with the foregoing reporting requirement is found by the Contracting Officer to be impracticable because of the size of

the Contractor's business or because of the nature of its accounting procedures; the Contractor may furnish one or more reports, based on its established accounting periods and covering the entire contract period, or royalties in excess of \$1,000 (if computed on an annual basis) paid or to be paid to each licensor on the Contractor's over-all business, together with such other information as will permit identification of the patents or other basis on which royalties are to be paid, in which event the Contractor shall furnish the Contracting Officer, upon his request and at Government expense, an allocation of such royalty payments to Government business or to the work or supplies covered by this contract; reference to any such periodic royalty reports, previously furnished to any Government agency and covering the period of performance of this contract, shall constitute compliance with the reporting requirement of this clause.

If this contract is in an amount which exceeds \$10,000, and no royalties or royalty rates are paid or to be paid directly to others under the circumstances set forth above, the Contractor agrees so to report in writing to the Contracting Officer prior to completion or final settlement of this contract.

ARTICLE VI-M. NOTICE AND ASSISTANCE.

(a) The Contractor agrees to report to the Contracting Officer, promptly and in reasonable written detail, each claim of patent infringement based on the performance of this contract and asserted against it, or against any of its subcontractors if it has notice thereof.

(b) In the event of litigation against the Government on account of any claim or infringement arising out of the performance of this contract or out of the use of any supplies furnished or construction work performed hereunder,

the Contractor agrees that it will furnish to the Government, upon request, all evidence and information in its possession pertaining to the defense of such litigation. Such information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

ARTICLE VI-N. AUTHORIZATION AND CONSENT.

The Government hereby gives its authorization and consent (without prejudice to its rights of indemnification, if such rights are provided for in this contract) for all use and manufacture, in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract), of any patented invention (i) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract, or (ii) utilized in the machinery, tools or methods the use of which necessarily results from compliance by the Contractor or the using subcontractor with (a) specifications or written provisions now or hereafter forming a part of this contract, or (b) specific written instructions given by the Contracting Officer directing the manner of performance.

ARTICLE VI-O. COPYRIGHT.

(a) The Contractor agrees to and does hereby grant to the Government, and to its officers, agents and employees acting within the scope of their official duties, (i) a royalty-free, nonexclusive and irrevocable license to reproduce, translate, publish, use and dispose of, and to authorize others so to do, all copyrightable material first produced or composed and delivered to the Government under this contract by the Contractor, its employees or any individual

or concern specifically employed or assigned to originate and prepare such material; and (ii) a license as aforesaid under any and all copyrighted or copyrightable work not first produced or composed by the Contractor in the performance of this contract but which is incorporated in the material furnished under the contract, provided that such license shall be only to the extent the Contractor now has, or prior to completion or final settlement of the contract may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(b) The Contractor agrees that it will exert all reasonable effort to advise the Contracting Officer, at the time of delivering any copyrightable or copyrighted work furnished under this contract, of any adversely held copyrighted or copyrightable material incorporated in any such work and of any invasion of the right of privacy therein contained.

(c) The Contractor agrees to report to the Contracting Officer, promptly and in reasonable written detail, any notice or claim of copyright infringement received by the Contractor with respect to any material delivered under this contract.

ARTICLE VI-P. DEFINITIONS.

As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, and the head or any assistant head of the executive agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

- (b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.
- (c) Except as otherwise provided in this contract, the term "Subcontracts" includes purchase orders under this contract.

ARTICLE VI-Q. PATENT INDEMNITY.

1. The Contractor agrees to indemnify the Government and its officers, agents and employees against liability, including costs and expenses, for infringement upon any Letters Patent of the United States (Except Letters Patent issued upon an application which is now or may hereafter be, for reasons of national security, ordered by the Government to be kept secret or otherwise withheld from issue) arising out of the performance of this contract or out of the use or disposal by or for the account of the Government of supplies furnished or construction work performed hereunder. The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given an opportunity to present recommendations as to the defense thereof; and further such indemnity shall not apply in any one of the following situations: (i) any infringement resulting from the addition to any such supplies of other supplies not furnished by the Contractor for the purpose of such addition; (ii) any settlement of a claim of infringement made without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction; (iii) any

claim or infringement arising from use or disposal outside the scope of any license limitation under which the Contractor is bound, provided that the Contractor has notified the Government of the limitation prior to first delivery under this contract; (iv) any infringement necessarily resulting from changes (other than the substitution of another standard commercial part or component manufactured or supplied by the Contractor) ordered pursuant to this contract, or from specific written instructions given by the Contracting Officer directing a manner of performing the contract not normally utilized by the Contractor.

2. The foregoing shall not apply to the following contract items or parts thereof, which are not standard commercial supplies:

NONE

3. The requirements of this patent indemnity clause will be satisfied if the Contractor exerts all reasonable efforts to negotiate for the inclusion of paragraphs 1 and 2 of this patent indemnity clause in any contract or purchase hereunder of \$3,000 or more.

In the event of refusal by a subcontractor to accept paragraphs 1 and 2 of this patent indemnity clause, the Contractor shall obtain the written authorization of the Contracting Officer (which authorization may be granted with respect to a particular supply contract) to proceed with the subcontract, and shall cooperate with the Government in the negotiation with such subcontractor of a mutually acceptable patent indemnity clause; provided, however, that the Contractor shall in any event require the subcontractor to grant to the Government an indemnity of no less scope and on no less favorable terms than that which the Contractor has received under such subcontracts.

ARTICLE VI-R. NOTICE TO THE GOVERNMENT OF LABOR DISPUTES.

Whenever the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor shall immediately give notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

ARTICLE VI-S. EXAMINATION OF RECORDS.

(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor involving transactions related to this contract.

(b) The Contractor further agrees to include in all his subcontract contracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives, shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "Subcontract" as used in this clause excludes (i) purchase orders not exceeding \$1,000 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

ARTICLE VI-T. RENEgotIATIOn.

(a) This contract is subject to the Renegotiation Act of 1951 (P.L. 9; 82nd Congress) and shall be deemed to contain all the provisions required by Section 104 of said Act.

(b). The Contractor (which term as used in this clause means the party contracting to furnish the materials or perform the work required by this contract) agrees to insert the provisions of this clause, including this paragraph (b) in all subcontracts as required by Section 104 of the Renegotiation Act of 1951; Provided, that the Contractor shall not be required to insert the provisions of this clause in any subcontract of a class or type described in Section 106 (a) of the Renegotiation Act of 1951.

ARTICLE VI-U. WALSH-HEALEY PUBLIC CONTRACTS ACT.

If this contract is for the manufacture or furnishing of materials, supplies, articles or equipment in an amount which exceeds or may exceed \$10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act as amended (41 U.S. Code 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable ruling and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

ARTICLE VI-V. ACTS OF THE GOVERNMENT.

It is understood and agreed that any of the following actions of the Government taken pursuant to the following provisions of this Part I shall be considered "an act of the Government" within the meaning of the excusable delays provisions of any related supply contract affected by such action, and further, the Contractor shall be entitled to an equitable adjustment, to be negotiated by the parties to the related supply contracts affected by any such action, in the delivery or performance dates, or prices, or both, and in any other contractual condition of the related supply contracts affected by such action.

1. Diversion of any item of Schedule "A" Facilities pursuant to Article I-B;
2. Giving of any notice that any item of Schedule "A" facilities is not reasonably necessary pursuant to Article I-C.1;
3. Failure to make timely delivery of, or delivery in such condition as to require repair or rejection of, any item of Schedule "B" facilities as set forth in Article II-A;
4. Directing the dismantling, removal, and shipment of any facilities pursuant to Article IV-D;
5. Giving of any notice of termination of right to use facilities pursuant to Article IV-F.1.

ARTICLE VI-W. APPROVAL OF CONTRACT

This Contract shall be subject to the written approval of the Assistant Secretary of the Army or his duly authorized representative and shall not be binding until so approved.

PART II

CHANGES AND EQUITABLE ADJUSTMENTS, TOOLING, AND REDETERMINATION OF CONTRACTS

SECTION A. CHANGES AND EQUITABLE ADJUSTMENTS:

1. To the extent provided in related supply contracts, the Contracting Officer hereunder may at any time, by a written order, make changes in the drawings, designs, or specifications of any or all of the military engines and parts therefor in the manufacture of which the facilities and tooling provided in Part I of this contract are used. It is understood and agreed that lists of parts shall be deemed to be specifications within the scope of this provision. If any such

changes cause an increase or decrease in the cost of performance of such related supply contracts, an equitable adjustment shall be made in the contract price, and the related supply contracts shall be modified in writing accordingly.

2. It is understood and agreed that all equitable adjustments in price arising out of changes directed pursuant to paragraph 1 above shall be made under this contract. Claims of the Contractor shall be made within 30 days of the receipt of the change order or within such further period as the Contracting Officer may approve. Upon receipt of such claims, the parties hereto shall negotiate, at the times hereinafter set forth, such equitable adjustments. Similar claims of the Government for equitable adjustments shall also be negotiated at the same times. Failure to agree to any adjustment shall be dispute concerning a question of fact within the meaning of the provision of this contract entitled "Disputes." However, nothing in this provision shall excuse the Contractor from proceeding with related supply contracts as duly changed. It is contemplated that the equitable adjustments pursuant to this paragraph 2 will be negotiated prior to the times for redetermination of the prices set forth in Section C here following and that the prices of military engines, and parts therefor, as equitably adjusted, will then be redetermined and will be effected as redetermined prices pursuant to said Section C or by Supplemental Agreement hereto.

3. From time to time hereafter, the Contracting Officer may issue instructions relating to the procedure to be followed by the Contractor in the preparation, contents, and distribution of documents necessary to the accomplishment of Change Orders and equitable adjustments as contemplated by this Section A.

SECTION B. TOOLING

1. Included in the equitable adjustments contemplated in SECTION A above will be the Contractor's expense in acquiring or manufacturing special tooling required in complying with the orders changing drawings, designs, or specifications above-mentioned. All such special tooling shall be deemed to have been "acquired or manufactured for use in the performance of this contract" within the meaning of the provision of this PART II entitled "SPECIAL TOOLING," and the rights, duties, and obligations of the parties hereto with respect to such special tooling shall be as provided therein.

2. All rights, duties, and obligations of the parties hereto with respect to certain special tooling, acquired or manufactured pursuant to Article 28, "Special Tooling," of Contract No. DA-20-018-ORD-11267 between the parties hereto, has been transferred to this contract by appropriate supplementation thereto. Such special tooling shall be treated in all respects as though it had been acquired or manufactured pursuant to the provision of this PART II entitled "SPECIAL TOOLING."

3. Notwithstanding any provisions of this PART II to the contrary, the special tooling mentioned in paragraphs 1 and 2 above may be used by the Contractor in the performance of all of the related supply contracts for which the use of the facilities and tooling in PART I of this contract is authorized in accordance with Article IV-A of PART I hereof.

4. Also included in the equitable adjustments contemplated in SECTION A above will be the Contractor's expense in modifying special tooling provided in Schedule "C" of PART I of this contract; the rights, duties, and obligations of the parties hereto with respect to such special

tooling, as modified, shall continue to be as provided in said PART I.

SECTION C. REDETERMINATION OF RELATED SUPPLY CONTRACTS.

1. The Contractor agrees that it has included or will include in all related supply contracts, except prime contracts with the Government, calling for the manufacture by the Contractor of military engines or spare parts, in connection with which manufacture any part of the facilities or tooling provided in this contract are used by the Contractor, a price redetermination provision in substantially the following form or such other form as the Contracting Officer has approved or may approve:

"The prices set forth in this Contract (or Purchase Order) shall be subject to redetermination by Buyer and Seller from time to time upon the request of either party, provided that the total contract price, exclusive of adjustments made pursuant to the changes condition hereof, shall not be increased by more than 15%. Redetermined prices agreed upon between the Government and the Seller shall be used as the basis for redetermined prices between Buyer and Seller under this condition."

2. The Government and the Contractor agree that they will periodically negotiate to increase or decrease the prices of military engines and spare parts covered by such related supply contracts in accordance with the following provisions:

(a) *Times for Negotiation*

(1) Hereafter at any time and from time to time, subject to the limitations hereafter specified, either the Government or the Contractor may deliver to the other a written demand that the parties negotiate to revise the prices under

related supply contracts. No demand shall be made having an effective date within 90 days of the effective date of any prior demand. Each demand shall specify a date (identical with or subsequent to the date of the delivery of the demand) as to which the revised prices shall be effective as to the deliveries made thereon or thereafter. The date is herein-after referred to as "the effective date of the price redetermination." It is understood and agreed that at the election of the Contracting Officer, the prices of all items theretofore and thereafter to be delivered will be revised under any related supply contract which require the furnishing of types of military engines or parts therefor not theretofore furnished by the Contractor. Any demand under this clause, if made by the Contractor, shall state briefly the ground therefor and shall be accompanied by the statements and data referred to in paragraphs (b) of this paragraph 2. If the demand is made by the Government, such statements and data will be furnished by the Contractor within 45 days of the delivery of the demand.

(2) In the event all remaining work under any such related supply contract, as it may from time to time be amended, shall be terminated under the applicable provisions thereof or on account of the termination of the prime contract under which such contract is a subcontract, no demand shall then or thereafter be made with respect to the prices under such related supply contract, and any such demand the effective date of which is less than thirty (30) days before the effective date of such termination shall be void and of no effect.

(b) *Submission of Data*

At the time of each of the times specified or provided for in subparagraph (a) of this paragraph 2, the Contractor shall submit (i) a new estimate and breakdown of the unit

cost of the military engines and parts therefor which are the subject matter of such related supply contract in respect of which a demand is made pursuant to subparagraph (a) of this paragraph 2, and the proposed prices of the items remaining under such related supply contracts after the effective date of the price redetermination, itemized so far as practicable, in the manner prescribed by WD Form No. 105; (ii) an explanation of the differences between the original (or last preceding) estimate and the new estimate; (iii) such relevant shop and engineering data, cost records, overhead absorption reports, and accounting statements as may be of assistance in determining the accuracy and reliability of the new estimate; (iv) a statement of experienced costs of production under such related supply contracts to the extent that they are available at the time or times of the negotiation of the revision of prices thereunder; and (v) any other relevant data usually furnished in the case of negotiation of prices under a new contract. The Government may make such examination of the Contractor's accounts, records, and books as the Contracting Officer may require and may make such audit thereof as the Contracting Officer may deem necessary.

(e) *Negotiations*

(1) Upon the filing of the statements and data required by subparagraph (b) of this paragraph 2, the Contractor and the Contracting Officer will negotiate promptly in good faith to agree upon prices for items to be delivered pursuant to such related supply contracts in respect of which negotiations will be conducted, on and after the effective date of the price redetermination. Negotiations for price redetermination under this paragraph 2 shall be continued on the same basis, employing the same types of data (including, without limitation, comparative prices, comparative

costs; and trends thereof) as in the negotiation of prices under a new Department of the Army Contract.

(2) After each negotiation the agreement reached will be evidenced by an appropriate supplemental agreement hereto stating the redetermined prices to be effective with respect to deliveries on and after the effective date of the price redetermination (or such other later date as the parties may fix in such supplemental agreement) pursuant to any such related supply contracts covered by such agreement.

(d) *Disagreements*

If within forty-five (45) days after the date on which the statements and data are required pursuant to subparagraph (a) of this paragraph 2 to be filed (or such further period as may be fixed by written agreement), the Contracting Officer and the Contractor fail to agree to redetermined prices (which term, for the purpose of this clause, shall include direct costs, indirect costs, and profit); the failure to agree shall be a dispute concerning question of fact within the meaning of the provision of this contract entitled "Disputes," and the prices so fixed shall remain in effect until the effective date of the price redetermination next following such disagreement.

(e) *Payments*

Until new prices shall become effective in accordance with negotiations conducted pursuant to the provision required by paragraph 1, the prices in force under such related supply contracts at the effective date of the price redetermination shall be paid upon all deliveries, subject to appropriate later revision made pursuant to such related supply contracts.

(f) *Termination Provisions*

For any of the purposes of any applicable provision in any such related supply contract which becomes operative in the event of the termination of such contract or of the prime contract under which such contract is a subcontract at the option or for the convenience of the Government (including, without limitation, the computation of "the total contract price" and "the contract price of work not terminated"), the contract price of delivered articles shall be deemed to be, (i) for all items delivered under such related supply contract prior to the effective date of the price redetermination, the contract price (giving effect to any prior revision thereof under this paragraph 2) applicable to each such item. (ii) For all items delivered under such related supply contract on or after the effective date of the price redetermination (A) the contract price as revised in accordance with this subparagraph 2 if such revision shall have been agreed upon; and (B), if such revision shall not have been agreed upon, then such estimated prices as the Contractor and the Contracting Officer may agree upon as reasonable under all circumstances, and in the absence of such an agreement such reasonable prices as may be determined in accordance with the provision of this contract entitled "Disputes."

(g) *Termination of related supply contracts during the initial period*

In the event that any related supply contract is terminated under any applicable provision thereof or on account of the termination of the prime contract under which such related supply contract is a subcontract, at the option or for the convenience of the Government, or is terminated on account of the Contractor's failure to perform its undertakings under such related supply contract, so that the last

delivery of such related supply contract as terminated is made prior to the completion of the initial period as experienced in such related supply contract, the Contractor within sixty (60) days after such last delivery shall furnish the data required by subparagraph (b) of this paragraph 2, and thereupon the parties shall negotiate in good faith to agree upon revised prices under such related supply contract. The agreement reached shall be evidenced by an appropriate agreement stating the revised prices of such related supply contract, and the Contractor will adjust the prices under such related supply contract. Any disagreement as to the revised prices shall be disposed of as a question of fact in accordance with the provision of this contract entitled "Disputes."

3. The Contractor agrees that it will take all steps necessary to secure immediate effect under related supply contracts for agreements between the parties hereto under paragraph 2 above. To that end, the Contractor agrees that, immediately upon receipt of or delivery of a demand to redetermine under paragraph 2 above, it will make demands under such related supply contracts as are affected thereby pursuant to its rights under the provision required by paragraph 1 above, with the same effective dates as the demands hereunder. The Contractor further agrees that it will agree only to revised terms and prices under such related supply contracts which are no less favorable than those negotiated under paragraph 2 above.

SECTION D. SPECIAL TOOLING

(a) The term "special tooling" as used in this clause, includes all jigs, dies, fixtures, molds, patterns, special taps, special gauges, special test equipment, and other special articles of equipment and manufacturing aids acquired or manufactured by the Contractor for use in the performance of this contract, and replacements thereof, which are

of such a specialized nature that, without substantial modification or alteration, their use is limited to the production of such supplies or parts hereof, or the performance of such services, called for by this contract, as are peculiar to the needs of the Government. The term does not include: (i) items of tooling or equipment heretofore acquired by the Contractor, or replacements thereof, whether or not altered or adapted for use in the performance of this contract; (ii) items of tooling or equipment which are usable for the production of supplies or parts thereof, or for the performance of services, which are not peculiar to the needs of the Government, or (iii) general or special machine tools or similar capital items.

(b) The Contractor agrees not to use any items of special tooling except in the performance of this contract, or except as otherwise provided by this clause, without prior written approval of the Contracting Officer. The Contractor may, with the approval of the Contracting Officer, use the special tooling in the performance of other contracts with the Government, or subcontracts under Government contracts, provided that the Contractor agrees not to include in the price or prices for any such contracts or subcontracts, involving the use of such special tooling, the cost of such tooling or any allowance or charge to cover depreciation or amortization which has previously been charged against this contract.

(c) As and when any substantial portion of usable special tooling is no longer needed by the Contractor for the performance of this contract, and of other Government contracts and subcontracts as to which approval has been obtained under paragraph (b) above, the Contractor shall promptly notify the Contracting Officer thereof, and shall furnish to the Contracting Officer a list of the products, parts or services for the manufacture or performance of

which such special tooling was used or designed. Upon completion or termination of all work under this contract, or of this contract and other Government contracts and subcontracts as to which approval has been obtained under paragraph (b) above, the Contractor shall furnish a final list in the same form covering all items not previously reported under this paragraph. Special tooling which has become obsolete as a result of changes in design or specification need not be reported, except as provided for in paragraph (d).

(d) In the event of any changes in design or specifications which affect interchangeability of parts, the Contractor shall, unless otherwise agreed to by the Contracting Officer, give the Contracting Officer notice of any part which is not interchangeable with the new or superseding part and the usable special tooling for each part covered in such notice shall be retained by the Contractor subject to the provisions of paragraph (i), pending disposition under paragraph (f).

(e) At the time it furnishes any list or notice under (c) or (d) above, the Contractor may designate those items of special tooling (either specifically or by listing the particular products, parts, or services for which such items were used or designed) which it desires to retain, together with a written offer: (i) to retain any or all of such items, free and clear of any Government interest, for an amount designated therein, which should ordinarily not be less than the then fair value of such items (which fair value takes into account, among other things, the value of such items to the Contractor for use in further work by it); or (ii) to retain any or all such items for such period of time and subject to such terms and conditions as may be agreed to by the parties hereto, subject to ultimate retention or dis-

position of such items in accordance with paragraph (f) hereof.

(f) Within 90 days after receipt of any list or notice under paragraph (e) or (d) hereof, or such further period as may be agreed upon by the parties, the Contracting Officer shall furnish to the Contractor: (i) a list specifying the particular products, parts, or services for which the Government may require special tooling, together with a request that the Contractor transfer title and deliver to the Government all usable items of special tooling which were used or designed for the manufacture or performance of any designated portion of such products, parts, or services, and which were on hand when production of such products or parts, or performance of such services, ceased; or (ii) an acceptance or rejection of any offer made by the Contractor under paragraph (e) above, or a request for further negotiation with respect thereto; or (iii) subject to the provisions of paragraph (j) hereof, a direction to the Contractor to sell, or to dispose of as scrap, for the account of the Government, any or all of the special tooling covered by such list; or (iv) a statement with respect to any or all of the special tooling covered by such list that the Government has no further interest therein and waives its rights therein; or (v) any combination of the foregoing, as the circumstances warrant. The Contractor shall promptly comply with any request by the Contracting Officer under this paragraph to transfer title to any items of special tooling, and shall, subject to the provisions of paragraph (j) hereof, (1) immediately prepare such items for shipment by proper packaging, packing, and marking, in accordance with any instructions which may be issued by the Contracting Officer, and shall promptly deliver such items to the Government, as directed by the Contracting Officer, or (2) if a storage agreement has been entered into, prepare such

items for storage in accordance therewith, as directed by the Contracting Officer. Any items of special tooling so delivered or stored shall be accompanied by such operation sheets or other appropriate data as are necessary to show the manufacturing operations or processes for which such items were used or designed. If the Contracting Officer has requested further negotiations under (ii) of this paragraph, the Contractor agrees that it will enter into such negotiations in good faith with the Contracting Officer. Any items of special tooling which are not disposed of by transfer of title and delivery to the Government under this paragraph, or by acceptance of an offer of the Contractor made under paragraph (e), or of such offer as modified in the course of negotiations, shall be disposed of in the manner set forth in (iii) or (iv) of this paragraph.

(g) If the Contracting Officer accepts an offer of the Contractor to retain any items of special tooling, or if any such items are sold to third parties or disposed of as scrap, the net proceeds shall: (i) be deducted from the amounts due to the Contractor under this contract and the contract amended accordingly; or (ii) be otherwise paid as the Contracting Officer may direct.

(h) The Contractor agrees that it will follow its normal industrial practice in maintaining property control records on all the special tooling, and that it will make such records available for inspection by the Government at all reasonable times. The Contractor further agrees that, to the extent practicable, it will identify by appropriate stamp, tag or other mark all special tooling subject to this clause.

(i) The Contractor agrees that between the date any usable items of special tooling are no longer needed by it, within the meaning of this clause, and the date of final disposition of such items under this clause, it will take all reasonable steps necessary to maintain the identity and

existing conditions of such items, unless the Contracting Officer has directed that such items be disposed of as scrap or has given notice under (f) (iii). The Contractor shall not be required to keep any such items in place.

(j) Any preparation of items for shipment required of the Contractor under paragraph (f) of this clause, or any disposal as scrap under paragraph (f) (iii), or any action required of the Contractor under paragraph (i), shall be taken pursuant to written instructions of the Contracting Officer, which shall provide for payment to the Contractor of any such additional cost. Any failure of the Contracting Officer to issue the Contractor specific disposition instructions shall be construed as an instruction to the Contractor to take the action required under paragraph (i) with provision for equitable adjustment or payment as provided for above.

(k) The Contractor agrees that, in placing any subcontracts or purchase orders under this contract which involve the use of special tooling, the full cost of which is charged to such subcontract or purchase order, it will include therein appropriate provisions to obtain rights comparable to those granted to the Government by this clause, and agrees that it will exercise such rights for the benefit of the Government, as the Contracting Officer may direct.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA

By

E. D. Möhlere
Colonel, Ord Corps
Contracting Officer
(Official Title)

CONTINENTAL MOTORS CORPORATION
(Contractor)

By A. Wild

By A. Wild, Vice President
 Detroit 15, Michigan

(Business Address)

Two Witnesses:

J. P. Koreck, Jr.
 Detroit, Michigan
 (Address)

G. Hug
 Detroit, Michigan
 (Address)

I, J. Sears certify that I am the Assistant Secretary of the corporation named as Contractor herein; that A. Wild who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for as on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal of said corporation this 18 day of May 1954

(Corporate Seal)

J. Sears

J. Sears, Ass't Secretary

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, who signed this contract for the had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

(Contracting Officer)

SCHEDULE "A"**FACILITIES TO BE ACQUIRED OR
MANUFACTURED BY THE CONTRACTOR**

(None at the time of execution).

SCHEDULE "B"**FACILITIES TO BE FURNISHED BY
THE GOVERNMENT****SECTION 1. FACILITIES BEING FURNISHED TO
THE CONTRACTOR FOR THE FIRST
TIME UNDER THIS CONTRACT:**

(None at the time of execution).

**SECTION 2. FACILITIES BEING FURNISHED TO
THE CONTRACTOR BY TRANSFER
FROM OTHER CONTRACTS:**

All the facilities set forth in a list entitled "Schedule of Government Furnished Property, Continental Motors Corporation, Military Division, Muskegon, Michigan," dated 1 July 1953, consisting of pages 1 through 219, copies of which are in the possession of the Government and the Contractor, incorporated herein and made a part hereof by reference.

SCHEDULE "C"**TOOLING TO BE FURNISHED BY
THE GOVERNMENT****SECTION 1. TOOLING BEING FURNISHED TO
THE CONTRACTOR FOR THE FIRST
TIME UNDER THIS CONTRACT:**

None

SECTION 2. TOOLING BEING FURNISHED TO THE CONTRACTOR BY TRANSFER FROM OTHER CONTRACTS:

a. One lot of special tooling manufactured or acquired by the Contractor pursuant to the contracts and identified by the Item Numbers and Schedules thereof set forth below, capable of producing 1200 AV-1790 series military engines plus concurrent spare parts therefor per month on the basis of three eight-hour shifts per day, seven days per week, when used with the facilities listed in Schedule "B," and the special tooling provided in paragraph 2 of Section B of Part II, of this contract:

CONTRACT NO.	ITEM NO.	SCHEDULE
DA-20-089-ORD-3587,	5	"F"
DA-20-089-ORD-3587 Supplement No. 34	16	"G"
DA-20-089-ORD-3587, Supplement No. 49	21	"H"
DA-20-018-ORD-11267, Supplement No. 11	5 (a)	Exhibit I
	5 (b)	Exhibit II

b. One lot of special tooling manufactured or acquired by the Contractor pursuant to the contract and identified by the Item Number and Schedule thereof set forth below, capable of producing 700 AO and AOS 895 series military engines plus concurrent spare parts therefor per month on the basis of three eight-hour shifts per day, seven days per week, when used with the facilities listed in Schedule "B" of this contract:

CONTRACT NO.	ITEM NO.	SCHEDULE
DA-20-089-ORD-2907,		
Supplement No. 4	1	"D"

EXHIBIT "A"**STATEMENT OF FACTS AND CIRCUMSTANCES**

1. The outbreak of hostilities in Korea and the enlarged responsibility of this country in domestic and foreign areas resulted in a substantial increase in requirements for Tanks and other heavy military vehicles, and the need of expanding production facilities to produce Tanks and other heavy military vehicles required establishment of additional production facilities to produce military engines and parts therefor.
2. Continental Motors Corporation was duly selected in accordance with Industrial Mobilization Planning as a logical source to establish facilities for the production of various models of military engines and spare parts therefor.
3. To implement this programme, Continental Motors Corporation has acquired, manufactured, or been furnished facilities and special tooling, including a Government-owned plant known as "Planeor-166-M," pursuant to various contracts with the Government which have established capacities to produce military engines and spare parts therefor. In the establishment of such capacities, part of the facilities and special tooling has been installed in plants of, and used by, various subcontractors of Continental Motors Corporation, in accordance with said contracts with the Government.
4. Continental Motors Corporation has been supplying and continues to supply various military engines and spare parts therefor directly to various Government prime contractors who are producing tanks and other heavy military vehicles, utilizing the above-mentioned Government facilities and special tooling with the permission of the Government in consideration of the right of the Government to

redetermine the prices of said military engines and spare parts therefor.

5. It is now desired to provide in one contractual instrument for the use (by Continental Motors Corporation and its subcontractors), care, and return of all of the facilities and special tooling acquired or manufactured in the establishment of the above-mentioned production capacities, and for the redetermination and equitable adjustment by the Government of the prices of military engines and components thereof.

EXHIBIT "B"

CONTRACTING OFFICER'S FINDINGS

I hereby find:

- (a) That the establishment and maintenance of capacity to produce military engines and spare parts therefor is highly important to the national defense;
- (b) That the continued use by Continental Motors Corporation and its subcontractors of Government-owned facilities and special tooling heretofore furnished, acquired, or manufactured is essential to the maintenance of the production capacity necessary to furnish military engines and spare parts therefor to the Government and its prime contractors;
- (c) That provision in one contractual instrument for the use, care, and return of all facilities and special tooling, presently provided in several different contracts, as well as for redetermination and equitable adjustment, will be in the best interests of the Government;
- (d) That the placing of this contract, pursuant to Title II of the First War Powers Act of 1941, as amended, and

Executive Order No. 10210, February 2, 1951, will facilitate the national defense.

E. D. MOHLERE
Colonel, Ord Corps
Contracting Officer

EXHIBIT 5

GOVERNMENT-OWNED LAND DESCRIBED AS
FOLLOWS ON INTERIM REPORT FROM
RECONSTRUCTION FINANCE CORPORATION
TO ORDNANCE CORPS
DATED 18 SEPTEMBER 1950

"Part of the southwest one-quarter of Section sixteen (16), Town 10 north, Range 16 west, Muskegon County, Michigan, described as follows: Commencing on the west line of said Section 16, 620 feet north of the southwest corner of said Section 16, thence north 701.90 feet to the northwest corner of the southwest one-quarter of the southwest one-quarter of said Section 16, thence continuing north 298.10 feet, thence north 88 degrees 15 minutes 35 seconds east 1950 feet, thence south 956 feet, thence south 88 degrees 12 minutes 20 seconds west 608.75 feet, thence south 0 degrees 2 minutes 30 seconds east along the east line of the said southwest one-quarter of the southwest one-quarter of said Section 16, 38.85 feet, thence south 88 degrees 4 minutes 20 seconds west 1341 feet to place of beginning, containing 43.146 acres more or less; AND

Commencing at the southwest corner of Section Sixteen (16) Township 10 North, Range 16 West, thence (orth) along the west line of said Section 16 a distance of 1620 feet, thence N. 88° 15' 35" E. 1950 feet to place of beginning; Thence N. 88° 15' 35" E. 630.00 feet, thence south 955.45 feet, thence S. 88° 12' 20" W. 630.10 feet, thence

north 956.00 feet to place of beginning; being a parcel of land comprising 13.8217 acres, all lying in the southwest quarter of Section 16, Township 10 North, Range 16 West, in the County of Muskegon, State of Michigan."

**GOVERNMENT-OWNED BUILDINGS DESCRIBED
AS FOLLOWS**

Description	Sq. Ft. of Floor Space		
	Below Grade	Ground Floor	Second Floor
Building A		389,100	17,600
Building B		105,600	
Building C		141,200	
Test Cells		82,482	1,751
Butler Building		23,712	
Power House		6,600	
Chip Building		14,250	
Incinerator		252	
Guard Houses		923	
Hose Houses		350	
Pumphouse		750	
Basements & Tunnels	89,775		
Compressor Room		2,720	
Tank & Pump House		864	
Switch House		345	
Dock No. 1		2,680	
Dock No. 5		5,600	
Dock No. 6		3,600	
Service Building		16,400	
Employees Entrances		8,562	
Machine Shop		18,040	
Maintenance Building		10,395	
Lockers, Toilets & Mise.		43,510	
Total Square Feet	89,775	877,935	19,251

EXHIBIT 6

SHEET NO. 1 ASSESSMENT ROLL—FOR THE TOWNSHIP OF

IN MUSKEGON COUNTY, MICHIGAN—FOR THE YEAR OF 19

DESCRIPTION NUMBER	ASSESSED TO AND ADDRESS	DESCRIPTION OF PROPERTY	REAL PROPERTY			REMARKS		State Tax	County Tax	Township Tax	School Tax	School Debit Service	Voted Increased School Building Millage	Voted Increased School Site Millage	Drain Tax	Drain Tax	Tax	Tax	1. Date Paid					
			True Cash Value as Assessed	True Cash Value as Fixed by Board of Review	True Cash Value as Determined by State Tax Comm.			Dollars	Dollars	Dollars											Mo.	Day	Year	
1		Sec 16 T10 NR 16W																						
2	MU-462 E. CONTINENTAL MOTORS & 463 CORP. SD 8 Muskegon, Mich.	SE 1/4 NE 1/4 SEC 16 T10 NR 16W 40 A	2,000	2,000																		89.14		
3	MU-464 CONTINENTAL MOTORS CORP. SD 8 Muskegon, Mich.	THAT PART OF NE 1/4 SW 1/4 LYING N OF HARVEY AVE SEC 16 T10 NR 16W	1,000	1,000																		44.57		
4	MU-161A-1 CONTINENTAL MOTORS CORP. SD 8 Muskegon, Michigan.	CCM AT NW COR OF SW 1/4 SW 1/4 SEC 16, TH N ALONG W SEC LINE 298.1 FT TH N 88°15'35" E 2580 FT TH S 297.83 FT TO S 1/2 LINE OF SEC 16 TH W ON SD 1/4 LINE 2580 FT TO PT OF BEG	5,200	5,200																		231.76		
5	MU-464A-2 ^o CONTINENTAL MOTORS and/or Occupant Muskegon, Michigan.	SEC 16 T10 NR 16W																						
6	MU-465 1 CONTINENTAL MOTORS CORP. SD 5 Muskegon, Michigan.	COM ON W LINE OF SEC 16, 620 FT N OF SW COR OF SD SEC TH N 701.9 FT TO NW COR OF SW 1/4 SW 1/4 TH E ALONG S 1/2 LINE OF SEC 16, 2580 FT TH S 657.62 FT TH S 88°12'20" WEST	3000 000	3000 000																		83820.00		
7	MU-465-2 ^o CONTINENTAL MOTORS CORP and/or Occupant Muskegon, Michigan.	1238.85 FT TH S 0°02'30" E ALONG E LINE OF SW 1/4 SW 1/4 38.85 FT TH S 88°04'20" W 1341 FT TO PL OF BEG SEC 16-T10 NR 16W																						
8	MU-465A-1 CONTINENTAL MOTORS TEST HOUSE SD 5 Getty St. City	N 280 FT OF SE 1/4 SW 1/4 SW 1/4 ALSO SW 1/4 SW 1/4 ALSO W 2 RODS OF W 1/2 OF SW 1/4 OF SE 1/4 OF SW 1/4 & E 2 RODS OF S 400 FT OF SE 1/4 SW 1/4 SW 1/4 ALSO COM AT A PT 668 FT E OF SW COR SEC 16																						
9	MU-465A-2	TH N 300 FT FOR PT OF BEG TH N 180 FT TH E 200 FT TH SWLY TO BEG EXC FROM ABOVE DESCRIBED PARCELS THE N 38.85 FT THEREOF ALSO EXC COM AT SW COR SEC 16 TH E 670.62 FT TH N																						
10	MU-465A-3 ^o	PAR TO W SEC LINE 128 FT FOR PT OF BEG TH S PAR TO W SEC LINE 128 FT TH W 200 FT TH NELY TO PT OF BEG SEC 16 T10 NR 16W 13.5 A	113 000	113 000																		3157.22		
11	MU-466-1 GERRIT RIEKELS SD 5 541 Jackson St. City	COM AT SW COR OF SEC 16 TH E ALONG S LINE OF SD SEC 668 FT FOR PT OF BEG TH N 400 FT TH E 669.25 FT TH S 400 FT TH W 668 FT TO PLACE OF BEG. ALSO COM AT SW COR SEC 16 TH.																						
12	MU-466-2	E 670.62 FT TH N PAR TO W SEC. LINE 128 FT FOR PT OF BEG. TH S PAR TO W SEC LINE 128 FT TH W 200 FT TH NELY TO PT OF BEG EXC THE E 33 FT OF THE ABOVE DESCRIBED																						
13	MU-466-3 ^o	PROPERTY ALSO EXC CQM 668 FT E OF SW COR SEC 16 TH N. 300 FT FOR PT OF BEG TH N 100 FT TH E 200 FT TH SWLY TO PT OF BEG SEC 16 T10 NR 16W 5.70 A	1400	1400																		39.13		
14	MU-467 JOHN BERGHUIS SD 5 940 Marquette Ave. City	W 1/2 OF SW 1/4 OF SE 1/4 OF SW 1/4 EXCEPT W 2 RODS SEC 16 T10 NR 16W 4.50 A	1900	1900																		53.09		
		TOTAL	3124 500	3124 500																		87434.91		

EXHIBIT 7

#7

COLLECTION FEES

DECEMBER 1 TO JANUARY 30 - 1%

JANUARY 21 TO FEBRUARY 20 - 4%

Muskegon Township Treasurer's Office

ARTHUR DEBAKER, TREASURER
1170 W. SHERMAN BLVD., MUSKEGON, MICH.
PHONE 5-7848

NOT A RECEIPT UNLESS STAMPED PAID

Present or Mail This Notice When Paying Taxes

Taxes assessed upon the following described property
in the Township of Muskegon for the year 1954

VALUATION \$ 3,000,000

	TAX	DOLLARS	CENTS
COUNTY	23949	00	
TOWNSHIP	8781	00	
SCHOOL	27141	00	
SCHOOL TAXES	23949	00	
DOMESTIC			
PAVING			
INDUSTRIAL			
SEWER & WATER			
SEWER			
TAX	83820	30	
COLLECTION FEES AS ABOVE	838	20	
TOTAL	84658	20	

MU-465-1 Continental Motors Corp
SD 5 Muskegon, Michigan.COM ON W LINE OF SEC 16, 620 FT N
OF SW COR OF SA SEC TH N 701.9 FT
TO NW COR OF SE $\frac{1}{4}$ SW $\frac{1}{4}$ TH E ALONG S
1/8 LINE OF SEC 16, 2580 FT TH S
657.62 FT TH S 88°12'20" WESTMU-465-2^o Continental Motors Corp
and/or Occupant
Muskegon, Michigan.1238.85 FT TH S 0°02'30" E ALONG
E LINE OF SW $\frac{1}{4}$ SW $\frac{1}{4}$ 38.85 FT TH S
88°04'20" E 1341 FT TO PL OF BLDG
SEC 16 T10 R16

CIRCUIT CT., MUSKEGON COUNTY

DEFENDANT'S EXH. 7

C. W. C.

DO NOT DETACH - RETURN BOTH BILLS With Your Remittance
Enclose Self-Addressed Stamped Envelope for Return Receipt

COLLECTION FEES
DECEMBER 1 TO JANUARY 20 - 1%
JANUARY 21 TO FEBRUARY 20 - 4%

Muskegon Township Treasurer's Office

ARTHUR REBAKER, TREASURER
1170 W SHERMAN BLVD., MUSKEGON, MICH.
PHONE 8-7242

NOT A RECEIPT UNLESS STAMPED PAID
Present or Mail This Notice When Paying Taxes

8

Taxes assessed upon the following described property
in the Township of Muskegon for the year 1954

VALUATION \$

5200

	TAX	DOLLARS	CENTS
COUNTY		41	51
TOWNSHIP		15	22
SCHOOL		116	23
SCHOOL EXTRA		58	80
SEWER			
PAVING			
SHEDWALL			
SEWER & WATER			
SEWER			
TAX		231	76
COLLECTION FEE AS ABOVE		2	32
TOTAL		234	08

MU-464A-1 Continental Motors Corp

108. Muskegon, Michigan.

ON AT NW COR OF SEC 16 AND SEC 16.
TR B ALONG S SEC LINE SWING FT TH
B SEC 15 33" E 2000 FT TH B 197.83
FT TH B 150 LAND OF SEC 16 TH B ON
SEC 14 LAND SWING FT TH B FT OF SEC

MU-464A-2* Continental Motors
and/or Development
Muskegon, Michigan.

SEC 16 TR 20 MR 361

CIRCUIT CT. MUSKEGON COUNTY

DEFENDANT'S EXH. 8

C.W.C.

DO NOT DETACH - RETURN BOTH BILLS With Your Remittance

Enclose Self-Addressed Stamped Envelope for Return Receipt

EXHIBIT 9

March 5, 1954

Board of Review for the Township of Muskegon
 Township Hall
 1990 Apple Avenue
 R. R. 4
 Muskegon, Michigan

Re: Assessment on or pertaining to property
 hereinafter described by the Township
 of Muskegon for the year 1954.

Gentlemen:

Continental Motors Corporation, a Virginia corporation, (hereinafter referred to as "Continental") which was on January 1, 1954 and has continuously thereafter been the occupant of the defense plant and real property hereinafter described under a permit from the United States of America, considers itself aggrieved by the assessment of \$3,000,000 by the Township of Muskegon as of January 1, 1954, upon or with respect to the lease or loan to and use by Continental of the parcels of real property including the buildings thereon described in the assessment rolls of your Township for the year 1954 as:

MU-465

SD5.

SECTION 16-10-16

Comm. on W line Sec. 16 620 ft. N of SW cor. of sd. Sec., th N 701.9 ft. to NW cor. of SW $\frac{1}{4}$ SW $\frac{1}{4}$, th E along S $\frac{1}{2}$ E ln of Sec. 16 2580 ft., th S 657.62 ft., th S 88° 12'20" W 1238.85 ft., th S 0° 02'30" E along E ln SW $\frac{1}{4}$ SW $\frac{1}{4}$ 38.85 ft., th S 88° 04'20" W 1341 ft. to pl. beg.

FU-464-A

SD8

SECTION 16:10:16

Comm. at NW cor. of SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, th N along W Sec. line 298.1 ft., th N 88°15' 35" S 2580 ft., th S 297.83 ft. to S $\frac{1}{8}$ line of Sec. 16, th W on said $\frac{1}{8}$ line 2580 ft. to pt. beg.

for county, township, school operating and school debt service taxes and hereby respectfully requests that you correct the above mentioned assessment by striking and completely eliminating such assessment from the assessment rolls of Muskegon Township for the following reasons:

1. If such assessment was made under the General Property Tax Laws of Michigan and not pursuant to Act No. 189 of the Public Acts of Michigan for 1953, then such assessment is illegal and void because the full and absolute title to the property so assessed was in the United States of America on and prior to January 1, 1954 and on and ever since January 1, 1954 such real property and buildings were and have been the property of the United States of America and by virtue of the Constitution and laws of the United States of America such real property and buildings thereon were and are wholly exempt from taxation by the Township of Muskegon, County of Muskegon, or by any subdivision of the State of Michigan and were improperly and illegally assessed to Continental by the said Township of Muskegon.

2. If such assessment was made pursuant to Act No. 189 of the Public Acts of Michigan for 1953, then such assessment is illegal and void because:

(a) The aforesaid Act is vague, uncertain, ambiguous and incomplete in that, among other things, Section 1 thereof fails to state what or who is subject to taxation and Section 2 thereof fails to state what taxes shall be

assessed and further fails to adequately describe which lessees or users of real property are to be assessed.

(b) The aforesaid Act is unconstitutional, illegal and void under the Constitution and laws of the United States of America and under the Constitution and laws of the State of Michigan, in that:

(i) The assessment of a tax to and the creation of a statutory debt payable by Continental as the lessee or user of the above described realty, the full and absolute title of which was owned by the United States of America on, prior to and since January 1, 1954, and upon which a defense plant then stood and now stands, results in the imposition of a charge upon the United States of America equivalent to the amount of such tax and thus such Act illegally taxes the United States of America, which is immune from taxation.

(ii) Said Act attempts to tax indirectly that which cannot be taxed directly, i.e. the United States of America and its property.

(iii) Said Act seeks to impose a state tax upon tax exempt property of the United States of America in the hands of a private occupant, lessee or user.

(iv) Said Act provides for an assessment equivalent in amount to an assessment which would be made were Continental the owner of such realty rather than an assessment based upon the true cash value of Continental's possessory interest in such realty and therefore the assessment is in effect an assessment upon the entire property which is exempt from taxation.

(v) Said Act does not provide for the assessment of Continental's possessory interest at its cash value and

therefore such Act is contrary to the provisions of Article X, Section 7 of the Constitution of the State of Michigan.

(vi) Said Act does not provide a uniform rule of taxation, is discriminatory and constitutes a denial of the equal protection of law.

(vii) Said Act refers to the provisions of the General Property Tax Law to fix the tax and object thereof and is therefore contrary to the provisions of Article X, Section 6 of the Constitution of the State of Michigan.

For the reasons above enumerated, the aforesaid assessment for the year 1954 is illegal and void and should be stricken and eliminated from the assessment rolls of your Township.

Very truly yours,

CONTINENTAL MOTORS CORPORATION
205 Market Street,
Muskegon 82, Michigan.

By H. W. Vandeven,
Its Treasurer

The above described Board of Review hereby acknowledges receipt on March 1, 1954 of the original of the foregoing letter.

Board of Review for the
Township of Muskegon

By Floyd M. Parslow,
Chairman

6

EXHIBIT 10

CONTINENTAL MOTORS CORPORATION
Muskegon, Michigan

Mr. Faust
Mr. Reese
cc: Mr. Riley
Mr. VanBlarcom (4)
File

April 17, 1954

REGISTERED MAIL, RETURN
RECEIPT REQUESTED

State Tax Commission
Tussing Building
Lansing, Michigan

RE: Assessment on or pertaining to property
hereinafter described by the Township of
Muskegon for the year 1954

Gentlemen:

Enclosed you will please find a copy of our letter of March 5, 1954 addressed to the Board of Review for the Township of Muskegon pertaining to the assessment as of January 1, 1954 upon or with respect to the lease or loan to and use by us of certain parcels of real property, including the buildings thereon, situated in the aforesaid Township. The original of the enclosure was delivered to said Board of Review on March 8, 1954 by a representative of this company present at such meeting. The assessment was not then withdrawn nor changed and we have since learned that the roll containing the assignment was signed on or about March 13, 1954 without any change having been made respecting such assessment.

We hereby complain of such assessment because it is not made in compliance with law but is illegal and void for all the reasons set forth in the above mentioned enclosure to which reference is hereby made.

If you have any form required to be filed with you with respect to this complaint or if you need any additional information in order to process this complaint you are respectfully requested to communicate with our general counsel, Butzel, Eaman, Long, Gust & Kennedy, 1881 National Bank Building, Detroit, Michigan addressing your communication to the attention of Mr. Clifford W. VanBlarcom who is associated with that firm. We would appreciate your sending a copy of any such form or request for information to our local counsel who is Mr. Joseph T. Riley of 715 Hackley-Union National Bank Building in Muskegon.

Very truly yours,

CONTINENTAL MOTORS CORPORATION

205 Market Street

Muskegon 82, Michigan

BY s/ H. W. VANREVEN

Its Treasurer

Encl.

JR:SS

EXHIBIT 11

MICHIGAN
STATE TAX COMMISSION
Lansing

Commissioners:

Louis M. Nims, Chairman
Ben E. Goldman
R. Gerald Barr

G. Mennen Williams, Governor

Edward W. Kane, Secretary
500 Tussing Building
Post Office Station B
Telephone 2-7769

April 20, 1954

Mr. Floyd Parslow, Supervisor
Muskegon Township, Muskegon County
1990 Apple Avenue
Muskegon, Michigan

Re: Appeal No. 60

Continental Motors Corporation

The Commission is in receipt of a complaint filed by the above named company from the assessed value of their real property located in the Township of Muskegon, Muskegon County, which has been accepted for investigation.

This will serve notice that an appeal from assessment has been filed as prescribed by the Michigan Property Tax Laws. The Commission requests that no taxes be spread against the present assessed value of this property until the investigation has been completed, and when warranted, a hearing on review held, and proper determination of assessed value made. Incorporated cities which spread a

summer tax may proceed to levy taxes on the valuations approved by the local Board of Review, providing that refunds for over-payments will be authorized in the event adjustments in valuations are necessary. Statutory notices and orders relative to hearing will be served as provided in the statutes.

A copy of this notice is being forwarded to the property owner as formal acknowledgment of the complaint.

Very truly yours,

s/ Edward W. Kane
Secretary

EWK:mc

cc. Mr. H. W. Vandeven, Treasurer
Continental Motors Corporation
205 Market Street
Muskegon 82, Michigan

EXHIBIT 12

**MICHIGAN
STATE TAX COMMISSION
Lansing**

November 1, 1954.

Mr. H. W. Vandeven, Treasurer
Continental Motors Corporation
205 Market Street
Muskegon, Michigan

Re: Appeal No. 60

Dear Sir:

On April 17, 1954, an appeal was received from the Continental Motors Corporation against the valuation placed against it for its occupancy of property in Muskegon Township, Muskegon County under Act 189, P. A. 1953.

The appeal was accepted by the State Tax Commission for examination and hearing and a hearing was held in the matter on August 20, 1954, after which briefs were filed on behalf of the appellant and also on behalf of the Orchard View Rural Agricultural School District and Muskegon Township.

This matter was taken up at a meeting of the State Tax Commission on October 27, 1954 and after lengthy discussion by the Commissioners it was determined that the sole point at issue is the validity of Act 189 P. A. 1953 and the legality of the assessment placed against Continental Motors Corporation under the provisions of the Act.

The Commission, therefore, adopted a resolution to deny the appeal of Continental Motors Corporation because it is not a function of the State Tax Commission to rule on the validity or the invalidity of a legislative act.

Very truly yours,
s/Edward W. Kane
Secretary

EWK:mc

cc: Mr. Floyd Parslow, Supervisor
Muskegon Township, Muskegon County
1990 Apple Avenue,
Muskegon, Michigan

OPINION

(Filed June 29, 1955)

Plaintiffs bring this action for the collection of taxes assessed in the amount of \$84,658.20 for the year 1954 against the defendant Continental Motors Corporation with respect to certain real estate, and improvements there-

BUTZEL, EAMAN, LONG, GUST
& KENNEDY

By Victor W. Klein

By Clifford W. Van Blarcom
1881 National Bank Building
Detroit 26, Michigan

and

Joseph T. Riley

715 Hackley Union National Bank Bldg.
Muskegon, Michigan
(Attorneys for Defendant and Appellant)

and

Wendell A. Miles

United States Attorney
Western District of Michigan
Grand Rapids 1, Michigan
(Attorney for Intervening Defendant
and Appellant)

ORDER STAYING PROCEEDINGS ON JUDGMENT

(Filed August 23, 1955)

Judgment having been entered in this Court and cause in favor of the Plaintiffs and against the Defendant in the amount of \$84,658.20, together with such penalties and interest as is provided by law, such penalties and interest to be computed and taxed as costs as of the time such judgment is paid; and it appearing to the Court that the parties have heretofore stipulated in open Court that in the event of an adverse decision herein the Defendant would be entitled to a stay of proceedings without bond;

on, owned by the United States but occupied by Continental under permit granted solely for the purpose of producing certain military supplies and equipment for the Department of the Army. The United States of America was granted leave to intervene as a party-defendant under claim of interest in the litigation which it claimed it was entitled to protect.

On January 1, 1954, the United States of America was the owner of a certain manufacturing plant, Plancor 166, located in Muskegon Township, Muskegon County, Michigan. The United States furnished this plant and its equipment to Continental under a permit to manufacture certain military equipment and supplies. Continental occupied this plant for this purpose without charge on January 1, 1954.

It was stipulated by these parties that the supervisor of Muskegon Township made an assessment of all of the real property in his township liable to taxation on tax day, i.e. January 1, 1954, at the true cash value, as required of him under Section 7.27 M.S.A.

It was further stipulated by these parties that pursuant to Act No. 189 of the P.A. of 1953 [MSA 7.7 (5)], the supervisor also valued as of that date the real property occupied by Continental and owned by the United States, referred to as Plancor 166, precisely as he would have done had such real property been owned in fee simple and occupied by Continental Motors Corporation; that he valued such real property at the true cash value of the fee simple ownership on the basis defined in Section 7.27 M.S.A., giving consideration to the advantages and disadvantages enumerated in such section; that the valuation of the real estate thus determined was \$3,000,000.00 for the parcel described in Exhibit 7 and \$5,200.00 for the parcel described in Exhibit 8, and such valuations were accordingly set down upon the tax rolls of such township opposite the descrip-

NOW, THEREFORE, on motion of the attorneys for the Defendant it is hereby ordered that:

- (1) All proceedings for the enforcement of such judgment be, and the same hereby are, stayed for the period of twenty (20) days from and after the day such judgment was entered herein in order to allow the said Defendant to prepare and file a claim of appeal, and
- (2) If a claim of appeal shall be filed herein, within the time permitted therefor, then that proceedings herein to enforce the said judgment be and the same hereby are stayed pending the appeal of said cause and until the further order of this court or the Supreme Court.

Dated August 23, 1955.

Raymond L. Smith
Circuit Judge

APPROVED FOR ENTRY:

Harold M. Street
On behalf of all Plaintiffs
C. W. Van Blarcom
On behalf of Defendant and
Intervening Defendant

tion of the parcel to which each pertained and the aforesaid tax bills were thereafter issued by the Treasurer's office of the said Township to the defendant Continental Motors Corporation; that the parcels of real property described in such tax bills were not assessed to the occupant thereof pursuant to Section 7.3, M.S.A.; and that the said Supervisor did not determine as of January 1, 1954, the cash value of nor did he ever separately value the right to use and occupy such parcels granted to the defendant, Continental Motors Corporation, by the United States of America.

It was further stipulated by these parties that Continental occupied these premises exclusively for the purposes outlined in the permits, Exhibits 1, 2, 3, and 4; that Continental is a corporation organized for profit, occupied these premises in connection with its business conducted for profit and made a profit out of such operations.

The taxes so assessed to Continental on January 1, 1954, have not been paid and plaintiffs seek to recover them by virtue of Act 189, PA 1953.

One of the questions before the court is whether the taxes assessed under Act 189, above, are an invasion of the Federal right of immunity to taxation by another taxing authority. Justice Jackson, in U.S. v. County of Allegheny, 322 US 174, says:

"Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand."

Certain generalizations appear with frequency in the opinions covering this subject. So we learn that taxes on the properties, functions and instrumentalities of the Government are under constitutional proscription. Mayo v. U.S., 319 US 441; U.S. v. County of Allegheny, supra;

Kern-Limerick, Inc. v. Scurlock, 347 US 110. At the same time we learn that taxes on the property, functions and profits of private interest are held valid. James v. Dravo Contracting Co., 302 US 134; Graves v. N.Y. ex rel. O'Keefe, 306 US 466; Alabama v. King & Boozer, 314 US 1; Oklahoma Tax Comm'n v. Texas Co., 336 US 342; and Esso Standard Oil Co., v. Evans, 345 US 495. And from the last group of citations we learn that an economic burden is no longer a factor in drawing the line of demarcation. Likewise these cases refer to a so-called new look at the subject of tax jurisdiction. It now appears that if the tax under scrutiny is not a direct tax on the property, function or instrumentality of the Government and if it is not discriminatory it has a chance of survival.

Act 189, P.A. 1953, provides for taxation of lessees and users of tax-exempt property, when leased or used for profit. The incidence of the tax falls upon the lessee or user and not upon the owner. The property covered is all tax-exempt property, whether belonging to the United States Government or to the State of Michigan or any of its municipalities or institutions. The conclusion is that this tax is neither direct or discriminatory.

Defendants lay great store by U.S. v. County of Allegheny, supra, and the statement found in that opinion to the effect that: ". . . possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." There the court held that the value of machinery, owned by the United States Government, could not be added to the value of the real estate, owned by the lessee of the machinery in assessing the value of the plant for the purpose of levying a real property tax. The court considered such a tax a tax upon the government's possessions. In a dissenting opinion, however, Justice Roberts thought that

the court was again reverting to the use of the economic burden factor.

Our own State Supreme Court in Fed. Reserve Bank v. Revenue Dept., 339 Mich. 587, at page 598, distinguishes Esso and U.S. v. Allegheny County, both *supra*, by stating:

"... the reasoning of the court seems to boil down to that same concept, that it is the legal incidence and not the economic burden of a State tax to which the immunity or statutory exemption of a Federal instrumentality extends and that exemption of the intermediate person upon whom the legal incidence of the tax falls is not to be implied, regardless of the fact that he passes its burden on to the United States, so long as congress has not expressly exempted such person therefrom."

So this court concludes that Act 189 does not violate Federal immunity.

A second question before the court is whether Act 189 violates Article X, Section 7 of the Michigan Constitution. Our State Constitution there provides:

"All assessments hereafter authorized shall be on property at its cash value."

Does the fact that Act 189 requires the assessment against the user to be for the same amount as though the user was the owner invalidate the tax? The reasonableness of this requirement is obvious. The worth of real estate bears some relationship to the burden it places upon a community or municipality. A large manufacturing plant brings into a community a relative number of employees with their families, homes and possessions. The burden upon the community is just the same whether the plant is immune from taxation or not. The property owner who is not immune is called upon to pay his fair share. It is equitable that the

same basis should be used to require the user of immune or exempt property to pay its fair share. Any other basis would be unfair to the property owner tax payers. As this court views it this is an indiscriminate feature of Act 189.

While the language of Act 189 is inartistic and incomplete a careful reading of the title and contents results in a conclusion that it was the legislative intent to tax the lessees or users of tax exempt property and not the property or any interest therein. To this extent it is a tax upon a certain class or group who qualify under the definitions and exceptions of the Act. It has characteristics of a specific tax. It is only when we look at the method of computation of the tax that we note any ad valorem features.

Mr. Justice Cooley in his work on Taxation (2d Ed., p. 238) describes ad valorem taxes as follows:

"Ad Valorem Taxes. A large proportion of the duties on imports are of this description, and so, sometimes, are many of the taxes which make up the internal revenue. The statute laying them prescribes the rule, but requires the action of appraisers in *apportioning them* between individuals . . ."

In the opinion of the court the State Constitution is not violated because the assessment was made at its cash value. The argument is made that the property taxed is the leasehold interest of the lessee or user. However the language of the Act plainly states that the tax is on the *lessee or user*. In effect the Act provides that where the property is exempt from taxation but the lessee or user of the property qualifies the latter shall be taxed the amount that the owner would have paid except for the exemption.

Accordingly the court finds that plaintiffs are entitled to a judgment against defendant Continental Motors Corpora-

Stated questions 1 and 2 were firmly resolved against Continental's contention in *United States v. City of Detroit*, — Mich —, and it is unnecessary to repeat what was said of such issues on that occasion. Stated question 4, dealing with alleged invidious discrimination against lessees of tax-exempt property engaged as the statute says in "business conducted for profit", deserves and will receive consideration.

Continental's counsel say, in support of question 4:

"It should also be noted that those subject to the Act are obliged to pay a tax which they cannot collect from the owner. No remedy has been provided for that purpose and any remedy, if it had been provided, would be ineffective against the sovereign rights of The United States. On the other hand, lessees of the vast bulk of the real property in this State, if they are taxed at all under 7.3 M. S. A., are given an effective remedy to collect such taxes from the owner of such realty [7.97, M. S. A.]. Thus, those few subject to Act 189, who use Federally-owned tax-immune realty, find themselves carrying a burden not imposed upon any other lessee or user of real property in this State. This too constitutes an unlawful discrimination against those engaged in the use of Federally-owned real property."

The contention is without merit. Indeed, when it is searchingly examined in light of the companion records that are before us, we should in my view conclude that the legislature by act 189 has wisely effectuated its continuing duty of providing equal burdens and equal privileges for those of corresponding or similar situation. Without act 189 a lessee or user for profit of federally-owned tax-immune realty becomes specially privileged and notably favored over his local classmates, and I refer to that class which directly shares the burdens as well as the benefits of local government. As counsel for plaintiffs say:

"When a large and valuable piece of property (Cost, \$8,352,- 768.30) which is tax exempt, is turned over, *rent free*, to a 'private individual, association or corporation' for use 'in connection with a business conducted for profit', it is quite obvious that the one having the use of such property has a valuable privilege. The one having the use of such property enjoys the benefits of police protection, fire protection, roads, schools for the children of his employees and the other benefits of local government."

tion in the amount of the tax, \$84,658.20 together with such penalties and interest as provided by law, but without costs, a public question being here involved.

Dated: June 29, 1955,

s/RAYMOND L. SMITH

Circuit Judge presiding.

JUDGMENT

(Filed August 23, 1955)

In this cause the plaintiffs having brought suit to recover the sum of \$84,658.20 representing taxes assessed to the defendant, Continental Motors Corporation, for the year 1954, together with interest and penalties thereon, and, proofs having been submitted and the Court having considered the arguments and briefs of counsel and having filed a written opinion in the said cause;

IT IS ORDERED that a judgment be and the same hereby is entered in favor of the plaintiffs and against the defendant, Continental Motors Corporation, in the amount of \$84,658.20, together with such penalties and interest as is provided by law, such penalties and interest to be computed and taxed as costs as of the time this judgment is paid, but without the usual taxable costs, however, a public question being involved.

Dated this 23rd day of August, 1955.

APPROVED AS TO FORM:

Harold M. Street

C. W. Van Blarcom

Raymond L. Smith
Circuit Judge presiding

Counsel conclude with observation that one enjoying such a privilege should, as a matter of justice, be required to contribute to the support of his or its local units of government. While they do not elaborate further, I think we should record sua sponte some of the facts proving dire and present accuracy of their representations in the field of education—, a field corporations like Continental eagerly reap when the crops thereof ripen in our engineering schools. June 23, 1952 the plaintiff school district voted to issue bonds in the sum of \$385,000 "for the purpose of erecting and furnishing an addition to the existing new school building in said district." The electors simultaneously provided 6 mills in accordance with Constitutional practice to support the issue. The bonds could not be sold. The reason is disclosed, this way, in a subsequent (December 30, 1952) resolution adopted by the board of education:

"WHEREAS, no bids were submitted for the purchase of the said bonds because of uncertainty expressed by the prospective purchasers relative to the present and future liability for taxes of the Continental Aviation and Engineering Corporation plant* located in the said School District, which plant, consisting of the land and buildings thereon, constituted some 52.79% of the total assessed valuation of the entire School District; * * *"

In these circumstances of necessity the property taxpayers and electors of the district were compelled at later special election to vote an additional 8 mills, making 14 mills in all extending from 1953 through 1971, to render the bonds salable. When judges consider, as the court did in *Brown v. Board of Education of Topeka*, 347 US 483** (— S Ct —; 98 L ed 873), that "Today, education is perhaps the most important function of state and local governments.", we arrive at special understanding of legislative purpose in the conception and enactment of act 189. It simply forces lessees and users for profit of tax-exempt lands to shoulder with others of the class the burdens that are attendant upon benefits all of the class receive.

The Slaughter-House Cases (16 Wall 36, 67-72, 21 L ed 394, 405-407; *Strauder v. West Virginia*, 100 US 303, 307, 308, 25 L ed 664-666) were quoted with approval in the Brown Case and, while not directly in point so far as act 189 is concerned, the fact of such quotation is worthy of present consideration in

*This is Planor 166.

**This is the first of the so-called segregation cases.

CLAIM OF APPEAL
(Filed September 7, 1955)

CONTINENTAL MOTORS CORPORATION, the above named Defendant, and UNITED STATES OF AMERICA, the above named Intervening Defendant, each claim an appeal from the judgment entered August 23, 1955, by the Circuit Court for the County of Muskegon. Each appellant takes a general appeal.

Dated September 2, 1955.

**BUTZEL, EAMAN, LONG, GUST
& KENNEDY**

By Victor W. Klein,

By Clifford W. Van Blarcom
1881 National Bank Building
Detroit 26, Michigan

and

Joseph T. Riley,

715 Hackley Union National Bank Bldg.
Muskegon, Michigan

**Attorneys for CONTINENTAL MOTORS
CORPORATION**

and

Wendell A. Miles,

317 Federal Building
Grand Rapids 1, Michigan
United States Attorney

**STATEMENT OF
REASONS AND GROUNDS FOR APPEAL**
(Filed October 28, 1955)

Each Appellant, for itself, claims the following reasons and grounds for appeal:

The Court erred in entering the judgment for taxes in

that it brings to clearly focused light, again in this century, a predictive purpose of the Fourteenth Amendment that has always accompanied its prohibitory words—that of firm implication of right to positive immunity from legal discrimination. The implication thus becomes a continuing if unenforceable admonition to legislative assemblies of the several states that affirmative vigilance against and enactments preventive of inequality of legal protection are quite in order whenever such inequality exists or threatens. As the court said in Strauder:

"The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property."

Legislation designed toward equality in the sharing of burdens and benefits of local government is reverence for rather than offense to our traditional right to equal protection of the laws. Act 189 is such legislation. It does not discriminate against lessees for profit of exempt property and commendably operates to prevent shocking discrimination in their favor. We accordingly hold as against this latest challenge that act 189 is valid and that the circuit judge was right in entering judgment for the plaintiff local units by force thereof.

The presence of the United States as an intervening party is noted. The Government and its brief are welcome but do not distract from duty of determination whether the named defendant should or should not be judged liable to plaintiffs on account of the matters alleged in the declaration we have before us. This is a common law action brought by plaintiff units of local government. The declaration names a private corporation only as defendant. In the absence of Congressional action the judgment of the court below when and if paid will be retired exclusively by the private defendant and not by the United States. No judgment has been entered against the United States, directly or indirectly. No tax was or is levied against its property and sovereign immunity of the United States from taxation and suit is not involved.

favor of plaintiffs under Act No. 189 of the Public Acts of Michigan for 1953 for the following reasons:

1. Act 189, as here applied, is repugnant to the Constitution of the United States and invalid because it imposes an ad valorem tax upon real property which on tax day was owned by the United States, was used exclusively for the production of defense material for the United States, and was immune from ad valorem taxation by the Township, County and School District, Appellees, under the controlling doctrine of Federal constitutional immunity.
2. The Court erred in holding that Act 189 was not an ad valorem tax upon said real property but was a specific tax upon the lessees or users of otherwise tax-immune property.
3. Because Act 189 attempts indirectly to impose an ad valorem tax upon real property which was owned by the United States, was used solely for its benefit and was otherwise immune from local ad valorem taxation, by the mere device of stating that it was taxing the lessees or users thereof to the same extent and in the same manner as though such lessee or user was the owner of such property. The impact of Federal constitutional immunity cannot thus be evaded.
4. Even if Act 189 is a privilege tax upon the lessee or user of such property, it is invalid because it is discriminatory in its purpose and effect. It is not imposed upon all lessees or users of real property but is primarily directed at Federally-owned property for the sole purpose of subjecting to state taxation such property which is otherwise constitutionally immune from state taxa-

tion, and therefore Act 189 is in conflict with and repugnant to the Constitution of the United States, and invalid.

5. Even if Act 189 is a privilege tax, it is invalid because, as here implied, it would impose a tax for the privilege of using Federally-owned property for the sole Federal purpose of providing for the common defense and supporting the army, which is within the exclusive power of the United States—and with respect to which Congress has legislated—and cannot be made a direct subject of a privilege tax imposed by a state or a subdivision thereof, and therefore Act 189 is in conflict with and repugnant to the Constitution of the United States, and invalid.

6. Act 189 is not applicable to property immune and exempt from state taxation by virtue of a Federal constitutional immunity (such as obtains here) but is limited in application solely to otherwise tax-exempt properties where the State has the power to tax but the exemption was granted by the State Legislature as a matter of grace.

7. Under the Michigan Constitution Act 189, if an ad valorem tax taxable to the lessee or user, is invalid because it provides for an assessment of the interest of such lessee or user, not based upon the true value of his possessory lease or use but upon the entire fee simple interest of an owner, and therefore is violative of Article X, Section 7 of such Constitution which requires that such interest be assessed at its true cash value.

AND, for the errors aforesaid, each Appellant, for itself, says that the judgment entered in the above cause ought to be reversed, vacated and held for naught.

The judgment of the circuit court should be affirmed, with costs to plaintiffs assessed against Continental only.

JOHN R. DETHMERS,
LELAND W. CARR.

Concurred in result.

EDWARD M. SHARPE,

TALBOT SMITH,

EMERSON R. BOYLES,

HARRY F. KELLY,

Concurred with Black, J.

Justice Edwards took no part in this decision.

Signed: EUGENE F. BLACK.
HARRY F. KELLY.
EDWARD M. SHARPE.
TALBOT SMITH.
EMERSON R. BOYLES.

I concur in the result

Signed: JOHN R. DETHMERS.
LELAND W. CARR.

[File endorsement omitted.]

In the Supreme Court of the State of Michigan

Present the Honorable JOHN R. DETHMERS, Chief Justice,
EDWARD M. SHARPE, TALBOT SMITH, EMERSON R. BOYLES,
HARRY F. KELLY, LELAND W. CARR, EUGENE F. BLACK, Associate Justices.

46679

TOWNSHIP OF MUSKEGON, ET AL., PLAINTIFFS

v.

CONTINENTAL MOTORS CORPORATION, DEFENDANT AND APPELLANT,
UNITED STATES OF AMERICA, INTERVENING DEFENDANT
AND APPELLANT

Remittitur

June 28, 1956

The records and proceedings in this cause, having been brought to this Court by appeal from the Circuit Court for the County of Muskegon, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in

said record and proceedings, and in the giving of judgment in said Circuit Court, there is No Error. Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Muskegon be and the same is hereby in all things affirmed, and that the plaintiffs do recover of the Continental Motors Corporation, their costs, to be taxed, and that they have execution therefor.

In the Supreme Court of the State of Michigan

Notice of Appeal to the Supreme Court of the United States

Filed September 14, 1956

[Title omitted.]

I. Notice is hereby given that Continental Motors Corporation and United States of America, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan, affirming the judgment of the Circuit Court for the County of Muskegon in favor of the aforesaid plaintiffs and against said Continental Motors Corporation in the amount of \$84,658.20, together with penalties and interest as provided by law, which final judgment was entered in this action on June 28, 1956.

This appeal is taken pursuant to 28 U. S. C., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The printed record on appeal and the calendar entries in this case, in the Supreme Court of the State of Michigan.
2. The opinion, in this case, of the Supreme Court of the State of Michigan.
3. The judgment and remittitur, in this case, of the Supreme Court of the State of Michigan.
4. This notice of appeal and proof of service thereof.

III. The following questions are presented by this appeal:

1. Is Act No. 189 of the Public Acts of Michigan for 1953 (CLS 1954, Sections 211.181, 211.182 [Stat. Ann. 1955 Cum. Supp., Sections 7.7 (5), 7.7 (6)]}, as here applied, repugnant

to the Constitution of the United States and invalid for the reason that it imposes a tax upon property of the United States used exclusively for the production of defense materials for the United States and which is immune from taxation by the State of Michigan or its subdivisions?

2. Is Act No. 189 repugnant to the Constitution of the United States and invalid for the reason that it attempts indirectly to accomplish the unconstitutional purpose of imposing a tax upon property owned by the United States by providing that the lessee or user of the property shall be taxed to the same extent and in the same manner as though such lessee or user was the owner of the property, except to the extent that the Federal Government makes payments in lieu of taxes with respect to the property?

3. If Act No. 189 may be construed as imposing a privilege tax is it invalid as here applied for the reasons that it would impose a tax for the privilege of using federal property for the limited and sole purpose of providing materials for the common defense and supporting the army, which purposes are within the constitutional powers vested in the Federal Government and with respect to which Congress has legislated and the exercise of the constitutional right of the Federal Government to dispose of and make all needful rules and regulations respecting its property in the carrying out of its functions may not be made the subject of a privilege tax by any state or its subdivisions?

4. If Act No. 189 may be construed as imposing a privilege tax is it repugnant to the Constitution of the United States and invalid because it is discriminatory in its purpose and effect and is primarily directed at federally-owned property and is designed to subject to state taxation property which is constitutionally immune from such taxation?

5. Is immunity of federal property from taxation by a state determined by weighing the claimed burden upon a community or municipality against the benefits which the community or municipality derives as a result of the federal activity or by

In the Supreme Court of the State of Michigan

No. 46679

TOWNSHIP OF MUSKEGON, A MUNICIPAL CORPORATION,
 COUNTY OF MUSKEGON, A MUNICIPAL CORPORATION, OR-
 CHARD VIEW RURAL AGRICULTURAL SCHOOL DISTRICT NO. 5,
 MUSKEGON TOWNSHIP, A MUNICIPAL CORPORATION; PLAINTIFFS AND APPELLEES

v.

CONTINENTAL MOTORS CORPORATION, A VIRGINIA CORPORATION
 DOING BUSINESS IN THE STATE OF MICHIGAN, DEFENDANT
 AND APPELLANT, AND UNITED STATES OF AMERICA, INTER-
 VENING DEFENDANT AND APPELLANT

Before the ENTIRE BENCH

Opinion

June 28, 1956

BLACK, J.

This case is a direct descendant of *Continental Motors Corporation v. Township of Muskegon et al.*, — Mich. —. It marks the second and separate effort of a corporation hailing from Virginia and doing business for profit in Muskegon township to find legal means of transferring its more than substantial share of the cost of local government to the shoulders of local payers of property taxes.

The property known in the records of both cases as Plancor 166 was deeded May 6, 1953 by RFC to the United States with result that on the next ensuing tax day (January 1, 1954) Plancor 166 concededly became and remained exempt from taxation. The fact of such conveyance was noted in the cited case at page — of report and it with this suit transfers judicial attention from determination of validity of property taxes levied against Plancor 166, when title thereto stood in the name of RFC, to question whether the plaintiff taxing authorities lawfully assessed Continental, as continuing lessee for profit of Plancor 166 after title thereto passed to the United States pursuant to PA 1953, No. 189.*

*CLS 1954, §§ 211.181, 211.182 [Stat Ann 1955 Cum Supp §§ 7.7 (5), 7.7 (6)]. The title clearly indicates the legislative purpose. It reads: "AN ACT to provide for the taxation of lessees and users of tax-exempt property."

Turning now to Continental's status under said act 189 in conjunction with the present suit: The supplemental agreement, by which Continental continued to use and occupy Planeor 166 following transfer of title to the United States, contains this self-explanatory covenant:

"6. The Contractor** shall pay to the properly constituted authority or authorities as and when the same may become due and payable all taxes, assessments, excises and similar charges which may be lawfully taxed, assessed or imposed upon the Contractor with respect to or upon Planeor 166 or any part thereof, provided, however, that such taxes, assessments, excises or similar charges shall be prorated and apportioned as of the date of this Agreement and as of the date of determination thereof respectively. Nothing herein contained, however, shall prohibit the Contractor from contesting in good faith the validity of any such taxes for assessments."

The 1954 assessment having been levied against Continental under said act 189 in the total sum of \$84,051.76, and Continental having refused to pay, this suit to recover the levy followed. Trial to the court, Honorable Raymond L. Smith, circuit judge presiding, resulted in judgment for the plaintiff local units in accordance with their declaration and the present appeal by Continental to this Court. The substantial questions before us are stated by Continental as follows:

"1. Does Act No 189 of the Public Acts of Michigan for 1953 impose an ad valorem property tax or a privilege tax?"

"2. Is Act No 189 of the Public Acts of Michigan for 1953 invalid because it attempts to impose an ad valorem tax upon real property which was owned by the United States, was used solely for its benefit and was otherwise immune from local ad valorem taxation by the mere device of stating that it was taxing the lessees or users thereof in the same amount and to the same extent as though such lessee or user was the owner of such property and thus attempts to defeat the impact of Federal constitutional immunity?"

"4. Even if Act No 189 of the Public Acts of Michigan for 1953 imposes a privilege tax is it invalid as a privilege tax because it is discriminatory in purpose and effect, and is primarily directed at Federally-owned property and designed to subject to state taxation property which is constitutionally immune from such taxation?"

**Continental is the "Contractor"

the claimed inequities arising between federal property which is immune from taxation and private property which is not?

BUTZEL, EAMAN, LONG, GUST & KENNEDY,

By VICTOR W. KLEIN,

and CLIFFORD W. VAN BLARCOM,

1881 National Bank Building, Detroit 26, Michigan,

and JOSEPH T. RILEY,

715 Hackley Union National Bank Bldg., Muskegon,

Michigan,

Attorneys for Continental Motors Corporation.

and WENDELL A. MILES,

317 Federal Building, Grand Rapids 1, Michigan,

Attorney for United States of America.

Proof of service [omitted in printing].

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Nos. 564 and 565, October Term, 1956

Order noting probable jurisdiction

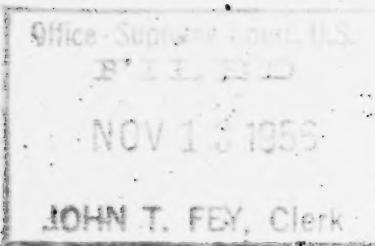
January 14, 1957

APPEALS FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

[Title omitted.]

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated with Nos. 401, 487 and 563 and a total of three hours allowed for oral argument.

LIBRARY
SUPREME COURT OF U.S.
NO. 5554



In the Supreme Court of the United States
OCTOBER TERM, 1956

CONTINENTAL MOTORS CORPORATION, A VIRGINIA CORPORATION, DOING BUSINESS IN THE STATE OF MICHIGAN, AND UNITED STATES OF AMERICA, INTERVENOR,
APPELLANTS

v.

TOWNSHIP OF MUSKEGON, A MUNICIPAL CORPORATION,
COUNTY OF MUSKEGON, A MUNICIPAL CORPORATION,
ORCHARD VIEW RURAL AGRICULTURAL SCHOOL DISTRICT NO. 5, MUSKEGON TOWNSHIP, A MUNICIPAL CORPORATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
MICHIGAN

JURISDICTIONAL STATEMENT OF THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General.

HILBERT P. ZARKY.

LYLE M. TURNER,

Attorneys,

Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

CONTINENTAL MOTORS CORPORATION, A VIRGINIA CORPORATION, DOING BUSINESS IN THE STATE OF MICHIGAN, AND UNITED STATES OF AMERICA, INTERVENOR,
APPELLANTS

v.

TOWNSHIP OF MUSKEGON, A MUNICIPAL CORPORATION,
COUNTY OF MUSKEGON, A MUNICIPAL CORPORATION,
ORCHARD VIEW RURAL AGRICULTURAL SCHOOL, DISTRICT No. 5, MUSKEGON TOWNSHIP, A MUNICIPAL CORPORATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
MICHIGAN

JURISDICTIONAL STATEMENT OF THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Muskegon County, Michigan, is not reported. The opinion of the Supreme Court of Michigan affirming the judgment of the Circuit Court is reported in 346 Mich. 218. The opinions of the Circuit Court and the Supreme Court of Michigan are set forth in the Appendix, *infra*, pp. 11-25.

JURISDICTION

This suit was brought by the Township of Muskegon and other municipal corporations for the collection of taxes assessed and levied under the provisions of Public Act No. 189, Michigan Public and Local Acts (1953). In defense, appellants Continental Motors Corporation and the United States alleged that the Michigan statute, as applied to the facts of this case, was repugnant to the Constitution of the United States and invalid. The Supreme Court of the State of Michigan decided the question in favor of the validity of the statute and the taxes which it imposed, and entered judgment on June 28, 1956. Notice of appeal was filed by Continental Motors Corporation and the United States on September 14, 1956. Jurisdiction to review a judgment of the highest court of a state by appeal is conferred on this Court by 28 U. S. C. Sections 1257 (2) and 2101 (c). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282; *Standard Oil Co. v. Johnson*, 316 U. S. 481; *United States v. Allegheny County*, 322 U. S. 174, 191; *Esso Standard Oil Co. v. Evans*, 345 U. S. 495; *Kern-Limerick, Inc. v. Seurlock*, 347 U. S. 110.

STATUTE INVOLVED

Michigan Public and Local Acts (1953), p. 252:

PUBLIC ACT NO. 189

AN ACT to provide for the taxation of lessees and users of tax-exempt property.

The People of the State of Michigan enact:

SEC. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: *Provided, however,* That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

SEC. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.

This act is ordered to take immediate effect.

Approved June 10, 1953.

QUESTIONS PRESENTED

1. Is Act 189 of the Public Acts of Michigan (1953), as here applied, repugnant to the Constitution of the United States and invalid for the reason that, without

the consent of Congress, it imposes a tax upon property of the United States used exclusively for the production of defense materials for the United States?

2. Is Act 189 repugnant to the Constitution of the United States for the reason that it taxes the property of the United States—to the full extent of its value—to its lessee or user to the same extent and in the same manner as though such lessee or user were the owner of the property?

3. If Act 189 may be construed as imposing a privilege tax, is it repugnant to the Constitution of the United States, as here applied, because it would tax the privilege of using federal property placed in the possession of the user for the limited and sole purpose of providing materials for the common defense and supporting the army, and would constitute an undue interference with the constitutional right of the Congress to dispose of and make all needful rules and regulations respecting the property belonging to the United States?

4. If Act 189 may be construed as imposing a privilege tax, is it repugnant to the Constitution of the United States and invalid because it is discriminatory in its purpose and effect and is primarily directed at collecting from users of federally-owned property a tax with respect to property of the United States which the state cannot assess or collect from the United States or its property?

5. Is immunity of federal property from taxation by a state determined by weighing the claimed burden upon a community or municipality against the benefits

5

which the community or municipality derives as a result of the federal activity?

6. Is Act 189 repugnant to the Constitution of the United States and invalid as violative of the due process and equal protection clauses of the Fourteenth Amendment because it taxes to Continental Motors Corporation property, or the value of property, which Continental Motors Corporation does not own, but which the Act conclusively presumes it does own?

STATEMENT

On January 1, 1954, the United States was the owner in fee simple of two parcels of property, on which there were improvements consisting of a manufacturing plant (Plancor 166), located in Muskegon Township, Muskegon County, Michigan.

This property, together with a large amount of personal property consisting of machinery, equipment and other industrial facilities, was furnished without charge by the United States to Continental Motors Corporation under a permit, the property to be occupied and used by the latter solely for the purpose of performing certain contracts to produce military equipment and supplies for the Army.

In producing such equipment and supplies no part of the cost of the facilities in the form of depreciation or amortization could be included by Continental Motors Corporation in the price of the end items under the related supply contracts for which the facilities were authorized for use. (R. 145.)

The Supervisor of Muskegon Township made an assessment of all of the real property in his town-

ship liable to taxation on tax day, i. e., January 1, 1954; at the true cash value, as required of him under Section 211.27, Compiled Laws of Michigan (1948); Section 7.27, 6 Michigan Statutes Annotated.

Also, pursuant to Act No. 189, Public Acts of Michigan (1953), the Supervisor valued at their true cash value the two parcels of land and improvements constituting the property of the United States known as Planter 166. He valued these parcels precisely as he would have done had they been owned in fee simple and occupied by Continental Motors Corporation; that is, he valued them at the true cash value of their fee simple ownership on the basis defined in Section 7.27, 6. Michigan Statutes Annotated, giving consideration to the advantages and disadvantages enumerated in that section. These valuations were set down on the tax rolls of the township opposite the description of the parcel to which each pertained and tax bills were thereafter issued by the Treasurer's office of the Township to Continental Motors Corporation. These bills were computed by applying the regular 1954 property tax rates established for the Township, County, School and School Debit, as were applied to other properties owned by private persons and which made up a part of the same assessment roll. (R. 198-201).

The parcels of property were not assessed to their occupant pursuant to Section 211.3, Compiled Laws of Michigan (1948); Section 7.3, 6 Michigan Statutes Annotated, and the Supervisor at no time ever separately valued the right granted by the United States

to Continental Motors Corporation to use and occupy the parcels constituting the property known as Planco 166.

Continental Motors Corporation is a corporation, organized and conducted for the purpose of making a profit, and it made a profit from its performance of its contracts with the Army wherein it was permitted to occupy and use Planco 166.

The taxes assessed to Continental Motors Corporation were not paid. The Township of Muskegon and the other municipal corporations concerned brought suit for the amount of the assessed taxes in the Circuit Court of Muskegon County and the United States intervened as a party-defendant.

On August 23, 1935, a judgment was entered by the trial court in favor of the plaintiffs pursuant to a written opinion. (R. 216.)

On appeal, the Supreme Court of Michigan approved the decision of the trial court, thereby sustaining the tax and the validity of Public Act No. 189.

The appellants contended at every stage of the proceedings that Act 189 is repugnant to the Constitution of the United States and invalid in that it authorizes a tax upon real property owned by the United States of America, infringes the sovereign immunity of the United States, and violates the Fourteenth Amendment of the Constitution. The constitutional questions were raised in the trial court in the Answer filed by Continental (R. 9-12), were incorporated by reference in the intervening petition of the United States (R. 16); and were urged in the

briefs filed in the trial court and the Supreme Court of Michigan. The constitutional questions were considered but rejected both by the trial court (R. 210-216) and the Supreme Court of Michigan (Appendix, *infra*, pp. 11-18).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents precisely the same basic question as is now pending before this Court on appeal in *United States and Borg-Warner Corp. v. City of Detroit*, No. 487, October Term, 1956. In both cases the constitutional validity of local taxes assessed under the authority of Michigan Public Act No. 189 on property owned by the United States and occupied by private parties is involved.

Factually, the two cases differ only in two respects. The property in the *Borg-Warner* case was strategically important to the national defense in the event of an emergency. But it was not, for the time being, needed for the present production of defense materials. It was leased on a standby basis which permitted its temporary use for commercial purposes but insured that it would be available when needed by the United States. In authorizing the defense department to make such leases, Congress expressly provided that the lessee's interest, but only the lessee's interest, should be subject to state or local taxes. Act of August 5, 1947, c. 493, 61 Stat. 774, Sec. 6 (10 U. S. C. 1952 ed., Sec. 1270d), the so-called Military Leasing Act. The Michigan statute did not confine itself to the taxation of that limited interest. It taxed the whole property as though the lessee, and not the

United States, were its owner, disregarding the terms of the Congressional consent.

In the present case, Planco 166 was occupied by Continental Motors under an occupancy permit. This permit was granted by the Department of the Army solely for the purpose of, and limited to, the production of materials needed by the Army as a part of the national defense. Thus, the present case differs from the *Borg-Warner* case in the use to which the plant was put. However, these differences do not detract from the conclusion that in each case, under principles established by this Court, the local tax here involved represents an undue and unconstitutional interference with the sovereign right of the United States freely to possess or dispose of its property.

The Supreme Court of Michigan in the instant case reaffirmed the basis of its decision in the *Borg-Warner* case. For the reasons set forth at length in the Jurisdictional Statement in the *Borg-Warner* case, we believe that basis to be erroneous.

In addition, however, to reaffirming its decision in the *Borg-Warner* case, the Supreme Court of Michigan in its opinion here (Appendix, *infra*, pp. 13-17) sought to strengthen the result reached by emphasizing its assumption that, unless this tax is upheld, the property of the United States would not adequately contribute to the burden imposed upon local public agencies and others by its presence and by the presence of the personnel employed by the user of the property. Even assuming the existence, as the Supreme Court of Michigan did, of a disparity in the

benefits from and the burdens of federal activity in the community involved, such ground has been rejected by this Court as a justification for an otherwise unconstitutional tax on the property or activities of the United States. *United States v. Allegheny County, supra; Kern-Limerick v. Scurlock, supra.*

CONCLUSION.

The questions presented by this appeal are substantial and important. It is respectfully submitted that probable jurisdiction should be noted.

J. LEE RANKIN,

Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

HILBERT P. ZARKY,

LYLE M. TURNER,

Attorneys.

NOVEMBER 1956.

APPENDIX

State of Michigan Supreme Court

[Caption omitted.]

Opinion

Before the Entire Bench.

BLACK, J. This case is a direct descendant of *Continental Motors Corporation v. Township of Muskegon et al.*, — Mich —. It marks the second and separate effort of a corporation hailing from Virginia and doing business for profit in Muskegon township to find legal means of transferring its more than substantial share of the cost of local government to the shoulders of local payers of property taxes.

The property known in the records of both cases as Plancor 166 was deeded May 6, 1953 by RFC to the United States with result that on the next ensuing tax day (January 1, 1954) Plancor 166 concededly became and remained exempt from taxation. The fact of such conveyance was noted in the cited case at page — of report and it with this suit transfers judicial attention from determination of validity of property taxes levied against Plancor 166, when title thereto stood in the name of RFC, to question whether the plaintiff taxing authorities lawfully assessed Continental, as continuing lessee for profit of Plancor 166 after title thereto passed to the United States, pursuant to PA 1953, No. 189.¹

¹ CLS 1954, Secs. 211.181, 211.182 [Stat Ann 1955 Cum Supp Secs. 7.7 (5), 7.7 (6)]. The title clearly indicates the legislative purpose. It reads: "AN ACT to provide for the taxation of lessees and users of tax-exempt property."

Turning now to Continental's status under said act 189 in conjunction with the present suit: The supplemental agreement, by which Continental continued to use and occupy Plancor 166 following transfer of title to the United States, contains this self-explanatory covenant:

6. The contractor² shall pay to the properly constituted authority or authorities as and when, the same may become due and payable all taxes, assessments, excises and similar charges which may be lawfully taxed, assessed or imposed upon the Contractor with respect to or upon Plancor 166 or any part thereof, provided, however, that such taxes, assessments, excises or similar charges shall be prorated and apportioned as of the date of this Agreement and as of the date of determination thereof respectively. Nothing herein contained, however, shall prohibit the Contractor from contesting in good faith the validity of any such taxes for assessments.

The 1954 assessment, having been levied against Continental under said act 189 in the total sum of \$84,051.76, and Continental having refused to pay, this suit to recover the levy followed. Trial to the court, Honorable Raymond L. Smith, circuit judge presiding, resulting in judgment for the plaintiff local units in accordance with their declaration and the present appeal by Continental to this Court. The substantial questions before us are stated by Continental as follows:

1. Does Act¹ No. 189 of the Public Acts of Michigan for 1953 impose an ad valorem property tax or a privilege tax?
2. Is Act No. 189 of the Public Acts of Michigan for 1953 invalid because it attempts to

²Continental is the "Contractor".

impose an ad valorem tax upon real property which was owned by the United States, was used solely for its benefit and was otherwise immune from local ad valorem taxation by the mere device of stating that it was taxing the lessees or users thereof in the same amount and to the same extent as though such lessee or user was the owner of such property and thus attempts to defeat the impact of Federal constitutional immunity?

4. Even if Act No. 189 of the Public Acts of Michigan for 1953 imposes a privilege tax is it invalid as a privilege tax because it is discriminatory in purpose and effect, and is primarily directed at Federally-owned property and designed to subject to state taxation property which is constitutionally immune from such taxation?

Stated questions 1 and 2 were firmly resolved against Continental's contention in *United States v. City of Detroit*, — Mich. —, and it is unnecessary to repeat what was said of such issues on that occasion. Stated question 4, dealing with alleged invidious discrimination against lessees of tax-exempt property engaged as the statute says in "business conducted for profit", deserves and will receive consideration.

Continental's counsel say, in support of question 4:

It should also be noted that those subject to the Act are obliged to pay a tax which they cannot collect from the owner. No remedy has been provided for that purpose and any remedy, if it had been provided, would be ineffective against the sovereign rights of The United States. On the other hand, lessees of the vast bulk of the real property in this State, if they are taxed at all under 7.3 M. S. A., are given an effective remedy to collect such taxes from the owner of such realty [7.97, M. S. A.].

Thus, those few subject to Act 189, who use Federally-owned tax-immune realty, find themselves carrying a burden not imposed upon any other lessee or user of real property in this State. This too constitutes an unlawful discrimination against those engaged in the use of Federally-owned real property.

The contention is without merit. Indeed, when it is searchingly examined in light of the companion records that are before us, we should in my view conclude that the legislature by act 189 has wisely effectuated its continuing duty of providing equal burdens and equal privileges for those of corresponding or similar situation. Without act 189 a lessee or user for profit of federally-owned tax-immune realty becomes specially privileged and notably favored over his local classmates, and I refer to that class which directly shares the burdens as well as the benefits of local government. As counsel for plaintiffs say:

When a large and valuable piece of property (Cost, \$8,352,768.30) which is tax exempt, is turned over, *rent free*, to a "private individual, association or corporation" for use "in connection with a business conducted for profit"; it is quite obvious that the one having the use of such property has a valuable privilege. The one having the use of such property enjoys the benefits of police protection, fire protection, roads, schools for the children of his employees and the other benefits of local government.

Counsel conclude with observation that one enjoying such a privilege should, as a matter of justice, be required to contribute to the support of his or its local units of government. While they do not elaborate further, I think we should record *sua sponte* some of

the facts proving dire and present accuracy of their representations in the field of education—, a field corporations like Continental eagerly reap when the crops thereof ripen in our engineering schools. June 23, 1952 the plaintiff school district voted to issue bonds in the sum of \$385,000 "for the purpose of erecting and furnishing an addition to the existing new school building in said district." The electors simultaneously provided 6 mills in accordance with Constitutional practice to support the issue. The bonds could not be sold. The reason is disclosed, this way, in a subsequent (December 30, 1952) resolution adopted by the board of education:

Whereas, no bids were submitted for the purchase of the said bonds because of uncertainty expressed by the prospective purchasers relative to the present and future liability for taxes of the Continental Aviation and Engineering Corporation plant³ located in the said School District, which plant, consisting of the land and buildings thereon, constituted some 52.79% of the total assessed valuation of the entire School District; * * *

In these circumstances of necessity the property taxpayers and electors of the district were compelled at later special election to vote an additional 8 mills, making 14 mills in all extending from 1953 through 1971, to render the bonds salable. When judges consider, as the court did in *Brown v. Board of Education of Topeka*, 347 U. S. 483⁴ (— S. Ct. —; 98

³ This is Plancor 166.

⁴ This is the first of the so-called segregation cases.

L. ed. 873), that "Today, education is perhaps the most important function of state and local governments.", we arrive at special understanding of legislative purpose in the conception and enactment of act 189. It simply forces lessees and users for profit of tax-exempt lands to shoulder with others of the class the burdens that are attendant upon benefits all of the class receive.

The *Slaughter-House Cases* (16 Wall. 36, 67-72, 21 L. ed. 394, 405-407; *Strauder v. West Virginia*, 100 U. S. 303, 307, 308, 25 L. ed. 664-666) were quoted with approval in the *Brown Case* and, while not directly in point so far as act 189 is concerned, the fact of such quotation is worthy of present consideration in that it brings to clearly focused light, again in this century, a precative purpose of the Fourteenth Amendment that has always accompanied its prohibitory words—that of firm implication of right to positive immunity from legal discrimination. The implication thus becomes a continuing if unenforceable admonition to legislative assemblies of the several states that affirmative vigilance against land enactments preventive of inequality of legal protection are quite in order whenever such inequality exists or threatens. As the court said in *Strauder*:

The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property.

Legislation designed toward equality in the sharing of burdens and benefits of local government is reverence for rather than offense to our traditional right to equal protection of the laws. Act 189 is such legislation. It does not discriminate against lessees for profit of exempt property and commendably operates to prevent shocking discrimination in their favor. We accordingly hold as against this latest challenge that act 189 is valid and that the circuit judge was right in entering judgment for the plaintiff local units by force thereof.

The presence of the United States as an intervening party is noted. The Government and its brief are welcome but do not distract from duty of determination whether the named defendant should or should not be judged liable to plaintiffs on account of the matters alleged in the declaration we have before us. This is a common law action brought by plaintiff units of local government. The declaration names a private corporation only as defendant. In the absence of Congressional action the judgment of the court below when and if paid will be retired exclusively by the private defendant and not by the United States. No judgment has been entered against the United States, directly or indirectly. No tax was or is levied against its property and sovereign immunity of the United States from taxation and suit is not involved.

The judgment of the circuit court should be affirmed, with costs to plaintiffs assessed against Continental only.

JOHN R. DETHMERS,

LELAND W. CARR,

Concurred in result.

EDWARD M. SHARPE,

~~TALBOT~~ SMITH,

EMERSON R. BOYLES,

HARRY F. KELLY,

Concurred with

Black, J.

Justice Edwards took no part in this decision.

Signed: EUGENE F. BLACK.

HARRY F. KELLY.

EDWARD M. SHARPE.

TALBOT SMITH.

EMERSON R. BOYLES.

I concur in the result.

Signed: JOHN R. DETHMERS.

LELAND W. CARR.

Endorsed: Filed June 28, 1956.

HUGH H. CARPENTER,

Clerk Supreme Court.

Circuit Court of Muskegon County

[Caption omitted.]

Opinion

(Filed June 29, 1955)

Plaintiffs bring this action for the collection of taxes assessed in the amount of \$84,658.20 for the year 1954 against the defendant Continental Motors Corporation with respect to certain real estate, and improvements thereon, owned by the United States but occupied by Continental under permit granted solely for the purpose of producing certain military supplies and equipment for the Department of the

Army. The United States of America was granted leave to intervene as a party-defendant under claim of interest in the litigation which it claimed it was entitled to protect.

On January 1, 1954, the United States of America was the owner of a certain manufacturing plant, Plancor 166, located in Muskegon Township, Muskegon County, Michigan. The United States furnished this plant and its equipment to Continental under a permit to manufacture certain military equipment and supplies. Continental occupied this plant for this purpose without charge on January 1, 1954.

It was stipulated by these parties that the supervisor of Muskegon Township made an assessment of all of the real property in his township liable to taxation on tax day, i. e., January 1, 1954, at the true cash value, as required of him under Section 7.27 M. S. A.

It was further stipulated by these parties that pursuant to Act No. 189 of the P. A. of 1953 [MSA 7.7 (5)], the supervisor also valued as of that date the real property occupied by Continental and owned by the United States, referred to as Plancor 166, precisely as he would have done had such real property been owned in fee simple and occupied by Continental Motors Corporation; that he valued such real property at the true cash value of the fee simple ownership on the basis defined in Section 7.27 M. S. A., giving consideration to the advantages and disadvantages enumerated in such section; that the valuation of the real estate thus determined was \$3,000.00 for the parcel described in Exhibit 7 and \$5,200.00 for the parcel described in Exhibit 8, and such valuations were accordingly set down upon the tax rolls of such township opposite the description of the parcel to which each pertained and the aforesaid

tax bills were thereafter issued by the Treasurer's office of the said Township to the defendant Continental Motors Corporation; that the parcels of real property described in such tax bills were not assessed to the occupant thereof pursuant to Section 7.3, M. S. A., and that the said Supervisor did not determine as of January 1, 1954, the cash value of nor did he ever separately value the right to use and occupy such parcels granted to the defendant, Continental Motors Corporation, by the United States of America.

It was further stipulated by these parties that Continental occupied these premises exclusively for the purposes outlined in the permits, Exhibits 1; 2, 3, and 4; that Continental is a corporation organized for profit, occupied these premises in connection with its business conducted for profit and made a profit out of such operations.

The taxes so assessed to Continental on January 1, 1954, have not been paid and plaintiffs seek to recover them by virtue of Act 189, P. A. 1953.

One of the questions before the court is whether the taxes assessed under Act 189, above, are an invasion of the Federal right of immunity to taxation by another taxing authority. Justice Jackson, in *U. S. v. County of Allegheny*, 322 U. S. 174, says:

Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand.

Certain generalizations appear with frequency in the opinions covering this subject. So we learn that taxes on the properties, functions and instrumentalities of the Government are under constitutional proscription, *Mayo v. U. S.*, 319 U. S. 441; *U. S. v. County of Allegheny*, *supra*; *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110. At the same time we learn that taxes on the property, functions and profits of

private interest are held valid. *James v. Dravo Contracting Co.*, 302 U. S. 134; *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *Oklahoma Tax Comm'n v. Texas Co.*, 336 U. S. 342; and *Esso Standard Oil Co. v. Evans*, 345 U. S. 495. And from the last group of citations we learn that an economic burden is no longer a factor in drawing the line of demarcation. Likewise these cases refer to a so-called new look at the subject of tax jurisdiction. It now appears that if the tax under scrutiny is not a direct tax on the property, function or instrumentality of the Government and if it is not discriminatory it has a chance of survival.

Act 189, P. A. 1953, provides for taxation of lessees and users of tax-exempt property, when leased or used for profit. The incidence of the tax falls upon the lessee or user and not upon the owner. The property covered is all tax-exempt property, whether belonging to the United States Government or to the State of Michigan or any of its municipalities or institutions. The conclusion is that this tax is neither direct or discriminatory.

Defendants lay great store by *U. S. v. County of Allegheny, supra*, and the statement found in that opinion to the effect that: " * * * possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." There the court held that the value of machinery, owned by the United States Government, could not be added to the value of the real estate, owned by the lessee of the machinery in assessing the value of the plant for the purpose of levying a real property tax. The court considered such a tax a tax upon the government's possessions. In a dissenting opinion, however, Jus-

vice Roberts thought that the court was again reverting to the use of the economic burden factor.

Our own State Supreme Court in *Fed. Reserve Bank v. Revenue Dept.*, 339 Mich. 587, at page 598, distinguishes *Esso* and *U. S. v. Allegheny County*, both *supra*, by stating:

* * * * reasoning of the court seems to boil down to that same concept, that it is the legal incidence and not the economic burden of a State tax to which the immunity or statutory exemption of a Federal instrumentality extends and that exemption of the intermediate person upon whom the legal incidence of the tax falls is not to be implied, regardless of the fact that he passes its burden on to the United States, so long as congress has not expressly exempted such person therefrom.

So this court concludes that Act 189 does not violate Federal immunity.

A second question before the court is whether Act 189 violates Article X, Section 7 of the Michigan Constitution. Our State Constitution there provides:

All assessments hereafter authorized shall be on property at its cash value.

Does the fact that Act 189 requires the assessment against the user to be for the same amount as though the user was the owner invalidate the tax? The reasonableness of this requirement is obvious. The worth of real estate bears some relationship to the burden it places upon a community or municipality. A large manufacturing plant brings into a community a relative number of employees with their families, homes and possessions. The burden upon the community is just the same whether the plant is immune from taxation or not. The property owner who is not immune is called upon to pay his fair share. It is equitable that the same basis should be used to require

the user of immune or exempt property to pay its fair share. Any other basis would be unfair to the property owner tax payers. As this court views it this is an indiscriminate feature of Act 189.

While the language of Act 189 is inartistic and incomplete a careful reading of the title and contents results in a conclusion that it was the legislative intent to tax the lessees or users of tax exempt property and not the property or any interest therein. To this extent it is a tax upon a certain class or group who qualify under the definitions and exceptions of the Act. It has characteristics of a specific tax. It is only when we look at the method of computation of the tax that we note any ad valorem features:

Mr. Justice Cooley in his work on Taxation (2d Ed., p. 238) describes ad valorem taxes as follows:

Ad Valorem Taxes. A large proportion of the duties on imports are of this description, and so, sometimes, are many of the taxes which make up the internal revenue. The statute laying them prescribes the rule, but requires the action of appraisers in *portioning them* between individuals * * *

In the opinion of the court the State Constitution is not violated because the assessment was made at its cash value. The argument is made that the property taxed is the leasehold interest of the lessee or user. However the language of the Act plainly states that the tax is on the *lessee or user*. In effect the Act provides that where the property is exempt from taxation but the lessée or user of the property qualifies the latter shall be taxed the amount that the owner would have paid except for the exemption.

Accordingly the court finds that plaintiffs are entitled to a judgment against defendant Continental Motors Corporation in the amount of the tax, \$84,-

658.20 together with such penalties and interest as provided by law, but without costs, a public question being here involved.

Dated June 29, 1955.

(S) RAYMOND L. SMITH,
Circuit Judge presiding.

Judgment of the Circuit Court of Muskegon County,
Michigan

(Filed August 23, 1955)

In this cause the plaintiffs having brought suit to recover the sum of \$84,658.20 representing taxes assessed to the defendant, Continental Motors Corporation, for the year 1954, together with interest and penalties thereon, and, proofs having been submitted and the Court having considered the arguments and briefs of counsel and having filed a written opinion in the said cause;

It is ordered that a judgment be and the same hereby is entered in favor of the plaintiff and against the defendant, Continental Motors Corporation, in the amount of \$84,658.20, together with such penalties and interest as is provided by law, such penalties and interest to be computed and taxed as costs as of the time this judgment is paid, but without the usual taxable costs, however, a public question being involved.

Dated this 23rd day of August 1955.

Approved as to form:

HAROLD M. STREET.

C. W. VAN BLARCOM.

RAYMOND L. SMITH;
Circuit Judge presiding.

Judgment of the Supreme Court of Michigan

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City Lansing, on the Twenty-eighth day of June, in the year of our Lord one thousand nine hundred and fifty-six.

Present the Honorable John R. Dethmers, Chief Justice, Edward M. Sharpe, Talbot Smith, Emerson R. Boyles, Harry F. Kelly, Leland W. Carr, Eugene F. Black, Associate Justices.

[Caption omitted.]

The records and proceedings of this cause having been brought to this Court by appeal from the Circuit Court for the County of Muskegon, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is No Error, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Muskegon be and the same is hereby in all things affirmed, and that the plaintiffs do recover of the Continental Motors Corporation, their costs, to be taxed, and that they have execution therefor.

Office Supreme Court U.S.

FILED

SEP 16 1957

JOHN T. PEY, Clerk

Nos. 37 and 38

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, APPELLANT

v.

TOWNSHIP OF MUSKEGON, A MUNICIPAL CORPORATION,
ET AL.

CONTINENTAL MOTORS CORPORATION, ETC., APPELLANT

v.

TOWNSHIP OF MUSKEGON, A MUNICIPAL CORPORATION,
ET AL.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF
MICHIGAN

BRIEF FOR APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 37

UNITED STATES OF AMERICA, APPELLANT

TOWNSHIP OF MUSKEGON, A MUNICIPAL CORPORATION,

ET AL.

No. 38

CONTINENTAL MOTORS CORPORATION, ETC., APPELLANT

TOWNSHIP OF MUSKEGON, A MUNICIPAL CORPORATION,

ET AL.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF
MICHIGAN

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Circuit Court of Muskegon County, Michigan (R. 210-216), is not reported. The opinion of the Supreme Court of Michigan (R. 223-228) is reported at 346 Mich. 218.

JURISDICTION

The judgment of the Supreme Court of the State of Michigan was entered on June 28, 1956. (R. 228-229.) A notice of appeal was filed by appellants United States and Continental Motors Corporation on September 14, 1956. (R. 229-231.) Probable jurisdiction was noted on January 14, 1957. (R. 231.) The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U. S. C., Section 1237.

QUESTION PRESENTED

Real property owned by the United States was occupied by Continental Motors Corporation under an occupancy permit, terminable at will, granted to Continental for the exclusive purpose of producing material for the Army. The Township of Muskegon, Michigan, has assessed taxes against Continental, as a user of this property, pursuant to a state statute which directs that taxes shall be collected from a lessee or user of tax-exempt realty "in the same amount and to the same extent as though the lessee or user were the owner of such property." A proviso in the statute creates an exception should the United States make an equivalent payment in lieu of these taxes. The statute further provides that the taxes shall constitute a debt of the lessee or user to the locality but shall not become a lien against the property.

The question presented is whether this statute, on its face and as here applied, is unconstitutional in that it invades the immunity of federal property from taxation by the states.

STATUTE INVOLVED

Michigan Public Act 139 of 1953 is set forth in the Appendix; *infra*, pp. 8-9.

STATEMENT

On January 1, 1954, the United States was the owner in fee simple of two parcels of property, on which there were improvements consisting of a manufacturing plant, located in Muskegon Township, Muskegon County, Michigan. (R. 2-3.)

This improved property, known as Plancor 166,¹ together with a large amount of personal property consisting of machinery, equipment and other industrial facilities, was furnished without charge by the United States to Continental under a permit, the property to be occupied and used by the latter solely for the purpose of performing certain Government contracts. Under the contracts, Continental was to install, at the expense of the United States, various production facilities, these to be used in turn for the manufacture of military equipment and supplies for the United States Army. (R. 42-43, 88-89, 92, 117, 210-211.) In computing the price of the equipment and supplies produced, Continental could not attribute any element of cost to the facilities furnished by and at the expense of the United States. (R. 145.)

In 1954, Plancor 166 was used by Continental exclusively for the production of material as provided in the agreement for occupancy and supplements thereto. (R. 22.) The United States has agreed to reimburse

¹ Plancor 166 is also referred to at times as the Getty Street Plant. (R. 22.)

Continental for all lawful taxes imposed upon it with respect to Planor 166. (R. 149.)

The Supervisor of Muskegon Township "made an assessment of all of the real property in his township liable to taxation on tax day, *i. e.*, January 1, 1954, at the true cash value, as required of him under Section 7.27 M. S. A." (R. 21.) Pursuant to Act No. 189, Public Acts of Michigan (1953), he valued, at the true cash value, the two parcels of land and improvements known as Planor 166. He valued these parcels precisely as he would have done had they been owned in fee simple and occupied by Continental Motors Corporation. (R. 21.) No attempt was made to separate or distinguish between the value of the fees and the value, if any, of Continental's right of occupancy. The valuations were set down on the tax rolls, and tax bills were thereafter issued by the Treasurer's office of the Township to Continental Motors Corporation. These bills were computed by applying the regular 1954 property tax rates in the same way that those rates are applied to properties owned by private persons. (R. 21, 198-201.)

The bills were not paid and suit was instituted against Continental for the amount of the assessed taxes in the Circuit Court of Muskegon County. The United States intervened as a party-defendant. (R. 1-5.)

On August 23, 1955, a judgment in favor of the taxing authorities was entered by the trial court. (R. 216.) On appeal, the Supreme Court of Michigan affirmed. This appeal followed.

Appellants have contended, at every stage of the proceedings, that Act 189 is repugnant to the Constitution of the United States in that it authorizes a tax upon real property owned by the United States, infringes the sovereign immunity of the United States, and violates the Fourteenth Amendment to the Constitution. The constitutional contentions were raised in the trial court in the answer filed by Continental (R. 9-12), were incorporated by reference in the intervening petition of the United States (R. 16), and were urged in the briefs filed in the trial court and in the Supreme Court of Michigan. They were considered but rejected both in the trial court and in the Supreme Court of Michigan. (R. 210-216; 223-228.)

ARGUMENT

MICHIGAN ACT 189, ON ITS FACE AND AS HERE APPLIED, RESULTS IN A DIRECT IMPOSITION OF TAX UPON FEDERAL PROPERTY. IT IS ALSO "SPECIAL LEGISLATION" DIRECTED AT FEDERAL PROPERTY.

In the brief filed by appellants in the companion case of *United States and Borg-Warner Corp v. City of Detroit*, No. 26, this Term, it is urged (pp. 13-28) that Michigan Act 189 (Appendix, *infra*, pp. 8-9) is violative of the Constitution of the United States both because the levy which it commands is a direct imposition upon federal property and because it is "special legislation" peculiarly designed to have that effect. The invalidity of the statute, as we there elaborate, is rooted in the fact that it makes no effort to distinguish between the ownership interest of the United States and the limited interest of the lessee or user;

on the contrary, Michigan has undertaken to tax the lessee or user of tax-exempt property as if he were the owner. All of the arguments advanced in appellants' brief in No. 26 are equally applicable here and are adopted in full for purposes of this brief.

While, in our view, these arguments are fully dispositive here, we would point out additionally that the instant case is, if, anything, stronger. In *Borg-Warner*, there is doubtless a limited, separable property interest in the lessee which is susceptible of appraisal—an interest which Michigan could tax if it chose to proceed upon that basis.² It is most doubtful, however, whether there is any such property interest in Continental. Continental (unlike *Borg-Warner*) has no lease. It is a user whose right of occupancy is terminable at will.³ Under its permit, moreover, it has no right to engage in production for itself as principal. It is strictly an agent or instrumentality for the United States, using facilities of the United States to produce for the United States. We believe, in short, that Continental has no measurable property interest in the facilities which it occupies and that the Governmental interest is not only paramount but complete.

² Congress has consented to such taxation. Act of August 5, 1947, c. 493, 61 Stat. 774.

³ See, e. g., Sections 7-103.21, 8-701 and 8-702 of the Armed Services Procurement Regulations issued by the Department of Defense under the authority of the Armed Services Procurement Act of 1947, c. 65, 62 Stat. 21.

CONCLUSION

For the reasons stated herein and in the brief for appellants in No. 26, to which the Court is respectfully referred, the judgment below should be reversed.

Respectfully submitted,

J. LEE RANKIN,

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Counsel for Continental Motors Corporation.

SEPTEMBER 1957.

APPENDIX

Michigan Public and Local Acts (1953), p. 252:

• PUBLIC ACT NO. 189.

AN ACT To provide for the taxation of lessees and users of tax-exempt property.

The People of the State of Michigan enact:

211.181. Taxation of lessees and users of tax-exempt property; exception. [M. S. A. 7.7 (5)]

Sec. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: *Provided, however,* That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

211.182. Assessment and collection; action of assump~~sit~~. [M. S. A. 7.7 (6)]

Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the

lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.

This act is ordered to take immediate effect.

Approved June 10, 1953.

Office - Supreme Court, No. 5
FILED

OCT 14 1957

JOHN T. FEY, Clerk

Nos. 37 and 38

IN THE

**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1957

UNITED STATES OF AMERICA,
Appellant

vs.

TOWNSHIP OF MUSKEGON, a Municipal
Corporation, et al.

CONTINENTAL MOTORS CORPORATION, ETC.,
Appellant

vs.

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ON APPEALS FROM THE SUPREME COURT OF THE
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QUESTION PRESENTED

May a state impose a tax upon the privilege of using tax-free property (including federally-owned property) in connection with a business conducted for profit, and measure such tax by the value of the property so used?

IN THE
**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1957

No. 37

UNITED STATES OF AMERICA,
Appellant.

vs.

TOWNSHIP OF MUSKEGON, a Municipal
Corporation, et al.

No. 38

CONTINENTAL MOTORS CORPORATION, ETC.,
Appellant.

vs.

TOWNSHIP OF MUSKEGON, a Municipal
Corporation, et al.

BRIEF FOR APPELLEES

STATEMENT

(Italics used throughout this Brief are ours unless otherwise indicated)

We believe a more complete statement of the factual background of the case than that contained in appellants' brief will help to clarify the issues.

The land involved was originally deeded by Continental Aviation and Engineering Corporation, a subsidiary of Continental Motors Corporation, to Defense Plant Corporation by deeds dated October 18, 1943 and April 4, 1945 (R. 28). A large manufacturing plant, variously

referred to as the Continental Aviation Plant, the Getty Street Plant and Plancoor 166, costing in excess of eight million dollars, was constructed thereon through the use of funds furnished by the Reconstruction Finance Corporation (R. 24). The land was leased under various arrangements to Continental Aviation thereafter.*

The land remained subject to local tax so long as title remained in D.F.C. or R.F.C. See Act of June 22, 1932, 47 Stat. 9.

The property was declared surplus in 1946 and accountability therefore acknowledged by War Assets Administration in 1948. On April 1, 1949, the premises were leased by R.F.C., acting through W.A.A., to Continental Motors Corporation, at a rental of \$364,032.00 per year. The lease required Continental to pay all taxes assessed relative to the premises and was to run until March 31, 1954. The lease was cancelled as of October 31, 1950. Since that time Continental has occupied the premises under a "permit" as set out in appellants' statement.*

Act 189 of 1953, originating as House Bill No. 46, introduced January 28, 1953, was adopted by unanimous vote of both houses of the Michigan legislature and became effective June 10, 1953 (R. 70-78).

By deed dated May 6, 1953, recorded December 9, 1953, the land was conveyed by R.F.C. to the United States of America.*

The plant has at all times pertinent here been used by Continental "in connection with a business conducted for profit" and a profit derived from such use (R. 22).

SUMMARY OF ARGUMENT

Appellants adopt much of the argument in the appellants' brief in the case of *U. S. and Borg-Warner Corp. vs. City of Detroit*, No. 26. Appellees find it impractical to follow a similar procedure and submit a brief independently of the appellee's brief in the Borg-Warner case.

Act 189 imposes a tax upon the privilege of using exempt property in connection with a business conducted for

*See *Continental Motors et al. vs. Twp. of Muskegon, et al.*, 346 Mich. 140.

profit. It does not impose a tax upon any property. While the value of property, including federally-owned property, is used as a measure for the tax, the tax is never on the property since the tax does not become effective and "can in no case have any incidence" unless the privilege, which is the subject of the tax, is exercised: *Fox Film Corp. vs. Doyle*, infra.

Ever since the decision of *James V. Dravo Contracting Co.*, infra, followed by *Alabama vs. King & Boozer*, infra, it has been uniformly held that the "legal incidence" rather than the "burden of the tax" is the controlling factor in determining whether a tax violates the immunity rule. Independent contractors are no longer regarded as "agents or instrumentalities" of the federal government within the immunity doctrine even though their activities are confined solely to performing work for the federal government. The legal incidence of the tax imposed by Act 189 falls squarely on Continental Motors Corporation, an independent contractor, engaged in business for profit.

It is well established that a tax on the privilege of enjoying the beneficial use of property may be measured by the value of non-taxable property if such property is used in connection with the privilege taxed. The only Constitutional requirements are that the measure employed be reasonable and that the tax be non-discriminatory.

The value of the property is not only a reasonable basis for assessing a tax on the beneficial use, it is difficult to imagine how the value of the privilege could otherwise be determined on any fair and non-discriminatory basis. The inherent fairness and non-discriminatory nature of the tax is its greatest asset.

Appellants can point to no specific case or Constitutional provision invalidating the tax. Appellees can and do cite herein many decisions sustaining the tax in principle and practice. The burden is upon appellants to demonstrate that the tax "clearly and palpably violates the fundamental law" before the court is justified in holding it unconstitutional." *Clyde vs. Gilchrist*, infra. This appellants cannot do on the basis of either principle or authority.

ARGUMENT

There can be no question of a state's plenary power to tax the privilege of using tax-exempt property in connection with a business conducted for profit, assuming, of course, the act imposing the tax does not otherwise infringe against any Constitutional prohibition.

"Apart from the restrictions and limitations of its own, and the Federal Constitution's and in the absence of any compact with or cession of jurisdiction to the Federal government, a state's power of taxation is, where the subjects to which it applies are within the jurisdiction of the state, unlimited, plenary, absolute and supreme. * * *

51 Am. Jur., p. 83-84.

"A state, acting through its legislature, may determine the persons, property, and privileges to be taxed, the mode, form, and extent of the imposition, the allocation of taxes between the state and its political subdivisions, and the manner and means of enforcement. Thus, a state has inherent legislative power to determine the subjects of taxation for general or for particular purposes and to make appropriate changes in the selections and classifications of the properties made subject to or exempted from taxation. It is not restricted to property taxes nor to any particular form of excises, and may adopt such new methods of taxation from time to time as may be found necessary. * * *

51 Am. Jur. 85-86.

The power of a state to tax the privilege of using property, separate and apart from the property itself, was aptly described by the colorful language of Justice Cardozo in *Heneford vs. Silas Mason Co.*, 300 U. S. 577, p. 582 as follows:

"The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership * * *. A state is at liberty, if it

- pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively . . . Calling the tax an excise when it is laid solely upon the use . . . does not make the power to impose it less. . . .
- It is clear that Act 189 is valid unless it can be demonstrated that it in some way offends against the United States Constitution. Appellants contend the Act violates the rule of implied immunity.

Doctrine of Implied Immunity

The rule that the federal government, its agents and instrumentalities, are not subject to tax by the states or local units of government, does not rest upon any express Constitutional provision. It is said to arise by necessary implication from our dual system of government. We believe a brief review of the origin and development of the doctrine will be helpful to the Court.

The doctrine had its origin in the case of *McCulloch vs. Maryland*, 4 Wheat 316. Congress had adopted legislation providing for the chartering of national banks. The measure was not without opposition. In retaliation, the State of Maryland adopted "An Act to impose a tax. (10¢ per \$5.00 in bank notes issued) on all banks or branches thereof in the State of Maryland, *not* chartered by the legislature." The tax was obviously discriminatory and aimed at the branch of the Bank of the United States established in Baltimore. In an opinion written by Justice John Marshall the court wisely and properly held the tax illegal. In keeping with the concept of law prevailing at the time, the doctrine of implied immunity was stated in absolute terms. It was supposed that if the power to tax a particular object existed at all, the power was unlimited and that the power to tax involved the power to destroy. The immunity was likewise thought of and laid down in absolute terms.

The next major step came in *Van Brocklin vs. State of Tennessee*, 117 U. S. 151, decided shortly after the Civil War.

In the Van Brocklin case the United States had acquired title to certain land for delinquent taxes. The State of

Tennessee levied taxes on the land while title was held by the United States. It appears that the land was vacant and, since not devoted to a public use, it was contended no immunity existed. The court held the property immune on the theory that retention of the title by the United States as security for its taxes was a governmental function. The court was careful to point out in its opinion that "The United States does not and cannot hold property, as a monarch may, for private or personal purposes."

It seems to have been quite generally assumed since the Van Brocklin decision that all federally-owned property is immune regardless of the use to which the property is put. Such was not the holding of the Van Brocklin case and, though the issue is not directly involved in this case, it appears that such a broad application of the rule could be seriously challenged in view of the recent limitations placed upon the corresponding immunity supposedly enjoyed by the states. See 163 *A. L. R.* 542.

Though the court had been careful to point out in *McCulloch vs. Maryland* that "This opinion does not deprive the states of any resources which they originally possessed," the doctrine was artificially extended far beyond its original import to exclude any tax that could conceivably affect the federal treasury.

In any event, application of the doctrine caused no particular difficulty for a hundred years or more. Federal activities remained on a limited scale. Even during periods of war, contracts for munitions were generally let to private concerns liable for the usual local taxes, so that the local units of government suffered but little from the application of the rule.

With the tremendous expansion of federal activities coming in the nineteen thirties it was inevitable that the impact of the extended and rigid doctrine of immunity be felt. Under the now repudiated test of the "burden of the tax," the application of the doctrine had reached absurd proportions. Any tax that remotely affected the federal treasury was stricken down. In *Gillespie vs. Oklahoma*, 257 U. S. 501, the states were denied the right to tax income derived from oil leases of Indian land. In *Rogers vs. Graves*, 299 U. S. 401, the salary of an employee of a government owned corporation was held immune from state tax. Early sales and use taxes met a similar fate.

where federal agencies or even private contractors perform work for the Federal Government were concerned. *Panhandle Oil Co. vs. Mississippi*, 277 U. S. 218, 56 A. L. R. 583.

The foregoing decisions were not without dissent. The statement of Justice Holmes in his dissenting opinion in the Panhandle case that "The power to tax is not the power to destroy while this court sits" foretold a realization that the oft-quoted expression that "the power to tax is the power to destroy" was better rhetoric than law. 140 A. L. R., p. 622.

As federal activities grew from a mere corner post office to the construction of huge dams, power plants, and later to ownership of gigantic mills and manufacturing plants, application of the immunity rule, "distorted by sterile refinements unrelated to affairs" (120 A. L. R. p. 1474) resulted in critical and frequently disastrous consequences.

The turning point came in *James vs. Dravo Contracting Co.*, 302 U. S. 134, 114 A. L. R. 318, upholding a West Virginia "Gross Sales and Income Tax" as applied to a contractor engaged in work for the Federal Government.

Rogers vs. Graves was overruled in *Graves vs. New York*, 306 U. S. 466, 120 A. L. R. 1466.

Gillespie vs. Oklahoma ceased to be law when *Oklahoma Tax Com. vs. Texas Co.*, 336 U. S. 342 was decided.

The "burden of the tax" test was completely repudiated in *Alabama vs. King & Boozer*, 314 U. S. 1, 140 A. L. R. 615, where the court first began to speak of the "legal incidence" of the tax as opposed to the "burden".

Panhandle Oil Co. vs. Mississippi, if not overruled by *Alabama vs. King & Boozer*, cannot stand in the light of the more recent decision in *Esso Standard Oil vs. Evans*, 345 U. S. 495, 97 L. Ed. 1174.

The immunity doctrine, presumed to apply with equal force to federal taxes relative to the state and local governments, underwent a similar metamorphosis in its application to state functions. *Collector vs. Day*, 11 Wall 113, holding the salaries of state officers to be immune from federal tax was overruled in *Graves v. New York*, supra. In these cases a distinction was made between functions "of a strictly governmental character" and those of a private nature. In *South Carolina vs. United States*, 199 U.S. 437, a federal liquor tax was upheld though the liquor was wholly owned

by the State of South Carolina and sold through its own dispensaries. The court held that "whenever a state engages in a business which is of a private nature that business is not withdrawn from the taxing power of the nation." Similar tests have since been applied in determining the extent to which state functions are immune from federal tax. See *United States vs. New York*, 140 F. 2d 608 and the annotation in 163 A.L.R. 542.

A number of tests have been applied in an effort to reach a satisfactory formula for application of the doctrine as to federal activities. They are briefly: (1) the "economic burden" test, now discarded; (2) the test of "degree" to which the federal government is affected, whether directly or remotely, which never gained general acceptance; (3) the "discrimination" test which is still recognized as valid; (4) the "legal incidence" test, which evolved during the nineteen thirties and has been applied in most recent cases; and (5) the "governmental status" test which is not unlike the tests applied in determining the validity of federal taxes upon state functions.

No one test appears to be satisfactory, and, in view of ever changing conditions, it is doubtful if any precise formula can be laid down which will prove a panacea for this eternal problem. So long as we have a dual system of government the problem will necessarily exist and its solution necessarily varies with the changes brought by time.

A phenomenon occurring during the late World War has further complicated the matter and has again brought the problem into acute focus. Whereas in prior wars the federal government had, for the most part, let its contracts for the materials and munitions of war to strictly private concerns, many of the plants used to produce materials and munitions in the last war were built under the jurisdiction of the Defense Plant Corporation, a subsidiary of the Reconstruction Finance Corporation. Title to the land was generally taken by D.P.C. which financed construction of the plants. As in the instant case, the plant was then leased to a private concern, generally with an option to purchase, and the leasing concern given contracts for the manufacture of the materials desired. Such plants were subject to state and local taxes by express

statutory provision so long as title was held by D.P.C. or R.P.C.

At the end of the war, the Surplus Property Act was adopted to provide a means for getting such property back into private hands. However, because of lack of purchasers or other reasons, in many instances title wound up in the United States of America with the use of the property, by lease or otherwise, in the hands of private concerns engaged in strictly commercial activities for profit. See *Continental Motors Corp. et al vs. Twp. of Muskegon et al*, 346 Mich. 141, and *United States v. Borg-Warner Corp. vs. City of Detroit*, No. 26.

Large and valuable properties are involved. These lands were not ceded by the state to the federal government nor were they purchased with the consent of the legislature of the state for the "erection of forts, magazines, arsenals, dockyards, and other needful building" pursuant to Art. 1, Sec. 8, Clause 17 of the United States Constitution. See M.S.A. 4.61. Title came to the United States, willy-nilly, by force of circumstances beyond the control of either government and probably against the desire of each.

With the foregoing background in mind, let us examine Act 189 to see if it violates the rule of implied immunity.

Does Act 189 Impose a Tax on Property of the United States?

Appellants contend that Act 189 imposes a tax upon federal property. The nub of the argument is that since the tax is measured by the value of property, it is therefore, a tax upon property. This precise contention is discussed further in this brief under the heading "Measure of the Tax."

The question of whether Act 189 is a property tax as opposed to a privilege tax is a matter of statutory construction. The Act was construed as imposing a privilege tax in both courts below. While the construction placed upon a statute by a state court is not binding on this court where a Constitutional question is involved, the construction adopted by the state court will be given great weight. It was held in *Clyde vs. Gilchrist*, 262 U.S. 94, p. 97 that:

"* * * when we are dealing with a matter of local policy, like a system of taxation, we should be slow

to depart from their judgment, if there is no real oppression or manifest wrong in the result."

The burden is upon appellants to establish that the Act violates some express or implied Constitutional provision before the court will be justified in declaring the Act invalid.

It was held in *Mich. Central Ry. Co. vs. Powers*, 201 U.S. 245, p. 267, that:

"The *presumption of constitutionality* following taxing statutes is stronger than applies to laws generally and *only where a taxing system clearly, and palpably violates the fundamental law will it be held invalid.*"

Even without the benefit of presumption we believe it can be clearly demonstrated that Act 189 in no way offends against any Constitutional provision.

To avoid confusion in terminology it is well to look at the various classifications of taxes.

The United States Constitution, Art. I, classifies taxes as direct, (such as property, capitation and poll taxes) and duties, imposts and excises.

The Michigan Constitution, Art. X, classifies taxes as either property taxes or "specific taxes."

The term "specific taxes" as used in the Michigan Constitution is synonymous with "excises" as that term is used in the Federal Constitution. Both terms include what are generally referred to as "privilege taxes" 51 Am. Jur. p. 52-56.

Aside from capitation and poll taxes, which are direct taxes upon persons, the term "direct taxes" appears to be synonymous with "property taxes." All other taxes, not clearly poll taxes or taxes on property, are considered "excise" or "privilege taxes." See 51 Am. Jur. p. 52 and 47 A.L.R. 971.

Because of the constitutional requirement that direct taxes be apportioned, this court has frequently been called upon to determine what taxes are direct taxes upon property, as distinguished from an excise or privilege tax.

This question was first considered in *Hylton vs. United States*, 3 Dall 171 involving a carriage tax. It was claimed that the tax was a direct tax upon property and, since not apportioned according to population, was unconstitutional. "The question was deemed of very great importance, and was elaborately argued." *Ann. Cas.* 1912 B p. 1329. Though the reasoning of the opinion is not too clear, the generally accepted theory upon which the tax was upheld is: "that the tax * * * was not levied directly on property because of its ownership but rather *on its use* * * *"
Brushaber vs. Union Pacific Ry. Co., 240 U.S. 1, *Ann. Cas.* 1917 B p. 714.

Nicols vs. Ames, 173 U.S. 509, involved a tax on sales made on an exchange or board of trade. After determining that "no microscopic examination as to the purely economical or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax," the court continued at p. 518-519:

"It is asserted to be a direct tax, because it is a tax upon the sale of property *measured by the value of the thing sold*, and such a tax is a direct tax upon the property itself * * *."

"We think the tax is in effect a duty or excise *laid upon the privilege*, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act."

As pointed out in *Flint vs. Stone Tracy Co.*, 290 U.S. 107:

"The distinction lies between the attempt to tax the property *as such* and to measure a legitimate tax upon the privilege involved in the use of such property."

Appellants contend that since the tax is measured on an "ad valorem" basis or "according to value" that the tax is a property tax. We recognize that this is one test frequently employed in determining the nature of a tax and that most property taxes are levied on an ad valorem basis. It does not follow, however, that because a tax is

measured on an ad valorem basis, it is necessarily a property tax. As pointed out in 51 *Am. Jur.* p. 53:

"The modern tendency, however, is toward ad valorem taxation even in the case of excises, as being more consonant with justice."

And as stated in 51 *Am. Jur.* p. 246:

"It is a well-settled principle, applicable particularly to excise and privilege taxes, that graduation of the rate or amount of a tax according to some reasonable scale, standard, or measure, which *usually has reference to the value or amount of the property used* in connection with, or the pecuniary benefit derived from, the act or privilege taxed, embraces no unlawful or unreasonable classification or discrimination."

Succession taxes are examples of privilege taxes measured strictly on an "ad valorem" basis. Though statutes providing for succession taxes seldom speak of the privilege of succession, and at first glance appear to be direct taxes upon the property transmitted, they are universally held to be privilege taxes and not taxes upon property. It was held in *Union Trust Co. vs. Probate Judge*, 125 Mich. 487 that the Michigan Inheritance Tax was a tax on "the privilege of succession" and that "the ad valorem feature" did not render the tax void as a tax on property "in that its amount is not arbitrary, but is based on the value of the property which is subject to the privilege." To the same effect, see *Snyder vs. Bettman*, 190 U.S. 249, 163 A.L.R. 566 and *United States vs. Perkins*, 163 U.S. 625, holding, incidentally, that the fact that the bequest was to the United States or a municipality did not afford an immunity from a succession tax. Also, the fact that the estate consists of Federal securities affords no immunity; *Plummer vs. Coler*, 178 U.S. 115. And these acts go much further than Act 189 and provide that the tax becomes a lien upon the property if not paid.

Sales and use taxes are measured by the price at which the property is sold (which is obviously its value) and thus have an "ad valorem feature" but are universally recognized as privilege taxes rather than taxes upon property.

In *Opinion of Justices*, 250 Mass. 391, 148 N. E. 889, cited 114 A.L.R., p. 848, an annual excise tax for the privilege of operating a motor vehicle, based upon the manufacturer's list price, with certain allowances for depreciation, was upheld. The court said at page 600:

"Excises founded in part upon the value of the property utilized in the exercise of the privilege thereby taxed are common. They involve no infringement of constitutional guarantees, provided in other respects they are genuine excise taxes." An examination of the proposed bill plainly shows that it provides for an excise for the use of highways and not a property tax."

In the final analysis, whether a tax is regarded as a tax on property or a privilege tax, is determined by its characteristics, its qualities, its attributes, its operation, and its effect.

Aside from the ad valorem basis upon which the tax is measured, Act 189 has none of the characteristics of a property tax and all of the characteristics of a privilege tax.

It is clearly stated in the title of the Act that it is "an Act to provide for the taxation of lessees and users of tax-exempt property."

Whereas property taxes are invariably based upon ownership and are payable regardless of whether the property is used or not, Act 189 applies *only* when the lessee or user *makes use* of certain property in connection with a business conducted for profit.

Property taxes are regarded as a tax "against the property as a thing," whereas Act 189 imposes a purely personal liability upon the lessee or user.

Property taxes almost invariably become a lien upon the property which is the subject of the tax and the property is the thing looked to for collection. The tax imposed by Act 189 becomes "a debt due from the lessee or user" recoverable only in an action of assumpsit.

Appellants rely heavily upon some language used by the court in the cases of *United States vs. Allegheny County*, 322 U.S. 174, *Macallem Co. vs. Massachusetts*, 279 U.S. 620, and *Miller vs. Milwaukee*, 272 U.S. 713. The cases do not hold what appellants claim for them.

(a) *The Allegheny County Case*

In the Allegheny County Case, Mesta Machine Company entered into a contract to manufacture guns for the United States. Mesta's plant was not equipped with the necessary machinery for the work. Some of the machinery was furnished by the government; some manufactured by Mesta, and some purchased from other manufacturers for which Mesta was reimbursed by the government. Mesta's contract with the government provided that "title to all such property should vest in the government." The machinery was bolted on concrete foundations in the plant. "It could be removed without damage to the building."

The machinery was assessed as part of the real estate and its value added to the value of the plant. The assessment was made as follows: "Land, \$293,795.00; Building, \$1,123,124.00; Machinery, \$2,489,085.00; Total Assessment, \$3,906,004.00."

The court held, p. 183:

"We hold that title to the property in question is in the United States and is effective for tax purposes."

This holding actually decided the case. Since the machinery had not become part of the realty by virtue of its being bolted to concrete foundations it was not, therefore, taxable property of the Mesta Company.

The court went on to point out, p. 184:

"It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax * * * this form of taxation is *not regarded primarily as a form of personal taxation*, but rather as a *tax against the property as a thing*!"

The court held the tax invalid insofar as it was upon property owned by the United States.

In the instant case we are dealing with a privilege tax and not a general property tax. Act 189 does not impose a tax against property "as a thing." It imposes a purely personal liability upon the "user" of property, and then

only when the use is in connection with a business conducted for profit.

The court took the pains to point out in the Allegheny County Case, p. 186-188:

"Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide ***"

"Actual possession and custody of government property is nearly always in someone who is not himself the government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held."

Act 189 does exactly what the court suggested might be done in the Allegheny case.

(b) *The Esso Standard Oil Case*

Appellants' contention that the tax is "on" the property cannot stand in view of the recent holding in the case of *Esso Standard Oil vs. Evans*, 345 U.S. 495. In that case a tax of \$196,000.00 assessed against Esso Standard Oil Company under a state tax on the privilege of storing gasoline was sustained. The gasoline involved was owned by the Defense Supply Corporation and was specifically exempted from state storage and use taxes by 55 Stat. 248. Esso had contracted to store the gasoline for the government. The government agreed to assume liability for all state taxes.

The tax was paid under protest and suit brought for recovery. United States Government intervened and took the position that the tax violated the rule of immunity. The appellants relied upon the Allegheny County case. The court said, p. 498 and 499:

"The appellants take a firm stand on *United States v. Allegheny County*, 322 U.S. 174, which they con-

tend is an analogous case that compels reversal of this decision. They say in effect that the tax here is no less "on" the property of the Federal Government than it was in that case."

The court very readily distinguished the Allegheny County case on the ground that the tax was a privilege tax and not a tax "on" the federal property. The court went on to point out, p. 499 and 500:

"Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since *James v. Dravo Contracting Co.*, 302 U.S. 134, this has been no fatal flaw. We must look further, and find either a stated immunity created by Congress in the exercise of a constitutional power, or one arising by implication from our constitutional system of dual government."

"Neither condition applies to the kind of governmental operations here involved. There is no claim of a stated immunity. And we find none implied. *The United States today is engaged in vast and complicated operation in business fields, and important purchasing, financial, and contract transactions with private enterprise. The Constitution does not extend sovereign exemption from state taxation to corporation or individuals contracting with the United States, merely because their activities are useful to the Government. We hold, therefore, that sovereign immunity does not prohibit this tax.*"

In the Esso case the state was taxing Esso because of its possession of government-owned property for storage. Act 189 taxes Continental because of its possession and use of government-owned property. Tennessee taxed the privilege of "storing" tax-exempt property in connection with a business conducted for profit. Act 189 taxes the privilege of "using tax-exempt property in connection with a business conducted for profit." In neither

instance is the tax "on" property of the federal government.¹

The Michigan Supreme Court recently made the following observation relative to the Esso case in *Federal Reserve Bank vs. Revenue Dept.*, 339 Mich. 587, p. 597-598, decided June 7, 1954:

"Similarly, in Esso, in the course of distinguishing that case from *United States v. Allegheny County* 322 U.S. 474 (64 S. Ct. 908, 88 L. ed 1209), the reasoning of the Court seems to boil down to that same concept, that it is the legal incidence and not the economic burden of a State tax to which the immunity or statutory exemption of a Federal instrumentality extends and that exemption of the intermediate person upon whom the legal incidence of the tax falls is not to be implied, regardless of the fact that it passes its burden on to the United States, so long as Congress has not expressly exempted such person therefrom."

The legal incidence of the tax under Act 189 falls squarely on Continental. The tax is not "on" property of the federal government and does not violate the rule of federal immunity. It is on the "user" and is imposed upon the privilege of using tax-exempt property in connection with a business conducted for profit.

(c) *Educational Films Corporation Case*

The case of *Educational Films Corporation vs. Ward*, 282 U.S. 379, 71 A.L.R. 1226, is directly in point. In that case a New York statute which imposed a franchise tax

¹While it is true that in the course of distinguishing the Allegheny County case the court did make reference to the fact the tax was not "based on the worth of the government property", this observation was neither essential nor controlling to the decision. In the final analysis it is the reasonableness of the measure of the tax that controls. A tax graduated according to the "amount" of gasoline stored cannot be said to be inherently more reasonable than a tax graduated according to the "value" of the gasoline stored.

of 4½% of the entire net income of a corporation was challenged where the assets of the corporation consisted in most part of ownership of certain copyrights. It was assumed that copyrights and royalties received therefrom were immune from tax. (It was later held otherwise in *Fox Film Corporation vs. Doyle*, 286 U.S. 123) but the reasoning of the Court is significant. It was claimed as a ground for invalidity that, since the tax was measured by tax-immune property, it amounted to a tax upon the property itself. The Court had this to say at p. 391:

"So well settled is this last-mentioned application of the doctrine that *an excise may be measured by tax-immune property*, that an appeal in which such a tax was assailed on the ~~very~~ grounds urged here were dismissed per curiam during the present term."

"It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject-matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that *there is a logical and practical distinction between a tax laid directly upon all or any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation;* and which would not be open to question if its amount were arrived at by any other non-discriminatory method."

The tax imposed by Act 189 "can in no case have any incidence" unless someone enjoys the privilege of using tax-exempt property "in connection with a business conducted for profit." Unlike a property tax, which applies regardless of whether or not the property is being used, the tax imposed by Act 189 applies only if the specified property is used in connection with a business conducted for profit.

Appellants claim that the tax is a tax "on" the property because measured by its value is without merit.

(d) *The Macallem Co. and Miller vs. Milwaukee Cases*

Appellants claim Act 189 is "special legislation" aimed at federally-owned property. If by this appellants mean that, in order to impose a just tax on those enjoying the special privilege of using tax-free property in connection with a business conducted for profit the Michigan legislature intended to include the privilege of using federally-owned property, appellants are correct. If appellants mean that the Michigan legislature intended to single out federally-owned property and impose a special tax on its use — a tax not borne by users of exempt property in general — appellants are 100% wrong as is apparent from a reading of the Act.

Appellants rely upon *Miller vs. Milwaukee*, 272 U.S. 713 and *Macallem Co. vs. Massachusetts*, 279 U.S. 620, to support their contention.

In *Miller vs. Milwaukee* the tax was measured *solely* by income from federal bonds which were expressly exempt from taxation. In *Macallem Co. vs. Massachusetts* the tax was a franchise tax based on "net income" which by amendment was made to specifically include *only* interest from exempt bonds.

The holding of these cases were clarified somewhat in *Educational Film Corp. vs. Ward*, *supra*, p. 392.

The court further limited and qualified those decisions in *Pacific Co. vs. Johnson*, 285 U.S. 480, at p. 493:

"The view that a tax, although levied on a taxable subject, may be deemed invalid because purposely levied to include a non-taxable subject in its measure, receives only a limited and qualified support from *Miller v. Milwaukee*, *supra*. There a state statute taxing corporate dividends was framed in such manner as to tax them only so far as they were derived from corporate income from tax-exempt bonds of the United States. The taxing act thus, on its face, did more than exhibit an intention of the one sovereign to include in the dividends taxed, those derived from income from a non-taxable instrumentalities of the other, together with income from all other sources. That admittedly would have been permissible; *** But it was the exclusion from the measure

of the tax of all income except from federal bonds which rendered the tax invalid.

With certain limited exceptions, Act 189 applies to all real property "which for *any reason* is exempt from taxation." State-owned, county-owned, municipally-owned property, and property owned by churches, hospitals and other charitable institutions, if put to commercial use, is included in the measure of the tax imposed by Act 189.

The Macallem case was further distinguished in *Hale v. Iowa State Bd. of Assessment and Review*, 302 U.S. 95, where the court pointed out that, under Massachusetts law, an income tax was classified as a tax "on property" thus emphasizing the significance of the language in the Pacific Co. case, p. 490:

"It suffices to say that the tax immunity extended to property * * * does not embrace a special privilege * * * otherwise taxable, merely because the value of the * * * property * * * is included in an equitable measure of the enjoyment of the privilege. The owner may enjoy his exempt property free of tax, but if he asks and receives from the state the benefit of a taxable privilege as the implement of that enjoyment, he must bear the burden of the tax which the state exacts as its price."

The privilege of using tax-free property in a business conducted for profit is clearly a privilege for which a state may exact a tax. Continental must bear the burden of the tax which the state exacts as its price for the exercise of the privilege.

Does Act 189 "Result" in a Direct Imposition of Tax upon Property?

Appellants contend Act 189 results in a tax upon federal property, and is therefore, invalid. If appellants' contention were sound it would invalidate virtually every federal excise from the first carriage tax to the multitude of excise taxes now in effect.

Consider, for example, the following:

Title 26, Sec. 4013 reads:

"There is hereby imposed upon the following articles sold at retail a tax equivalent to 10 per cent of the price for which so sold: Articles made of fur on the hide or pelt; and articles which such fur is the component material." * * *

Title 26, Sec. 4021 provides:

"There is hereby imposed upon the following articles sold at retail a tax equivalent to 10 per cent of the price for which sold:

Perfume	Pomades	Hairdressing
Extracts	Hair restoratives	

Title 26, Sec. 4091:

"There is hereby imposed upon lubricating oils sold in the United States by the manufacturer or producer a tax at the rate of 6 cents a gallon." * * *

Title 26, Sec. 4301:

"There shall be imposed a tax on each original issue of shares or certificates of stock, issued by a corporation." * * *

Title 26, Sec. 4501:

"There is hereby imposed upon manufactured sugar manufactured in the United States, a tax, to be paid by the manufacturer at the following rates: " * * *

At first glance, all of the above acts would appear to impose, or at least result in, a direct tax upon the property specified. Yet, all of the foregoing Acts are regarded as imposing a tax upon the privilege of manufacture, sale, transfer or some other privilege exercised relative to the property; for Congress has no power to impose a direct tax on any of the items of property mentioned without apportioning same according to population. Art. I, Sec. 9, C. 4, U. S. Constitution.

If, as appellants contend, a tax on a privilege exercised relative to certain property, if measured by the value of the property, is to be treated as *resulting* in the imposition of a direct tax upon the property itself, it necessarily follows that all of the above taxes are void. Such is simply not the law. All of the foregoing taxes have been sustained as valid excises imposed upon some privilege exercised relative to property, though the tax in most instances is measured by the value of the property.

Appellants seek to demonstrate that the tax is "on the whole of the property" by the hypothetical case of certain parcels of land designated A, B and C, all of equal value and each used commercially for profit. Parcel A is privately owned and subject to the General Property Tax. Parcels B and C are tax-exempt but leased for 75 years and five years respectively, to tenants who use them commercially. Appellants complain that the lessees of parcels B and C pay the same amount of tax each year under Act 189 and that their tax is also the same in amount as the owner of parcel A pays under the General Property Tax. What appellants overlook is the fact that, other factors being equal, the "privilege of use" enjoyed by the lessees of parcels B and C is of equal value during any given year. Appellants also overlook the fact that the privilege of use enjoyed by the lessees during a given year is equal in value to the privilege of use which the owner of parcel A enjoys by virtue of his ownership. Viewed as a tax on the "privilege of use" it is readily apparent that the lessees of parcels B and C should be taxed equally since they enjoy an equal privilege. It is also readily apparent that the tax paid by the lessees of parcels B and C should be equal to the tax paid by the owner of parcel A (who uses his land for the same purpose and thus derives no greater benefit from it during a given year) and is taxed by virtue of the ownership from which his privilege of use is derived.¹

Appellants claim the fact that the tax is equal in each instance proves that the tax is on "the whole of the prop-

¹ Additional privileges the owner of parcel A has, such as sale, mortgage, etc. are subject to additional excise taxes if exercised.

erty." It proves just the opposite. The reason the tax is equal is that each enjoys an equal privilege.

Applying the same analogy to the widely accepted use tax we have the following:

A, B and C each buy an automobile on the same day for \$3,000.00 subject to a 3% use tax. A's car is demolished in an accident the next day. B drives his car one year. C drives his car five years. A enjoyed little by way of "privilege of use." B enjoyed more, and C still more use. Yet all pay the same use tax. It is ridiculous to contend that because the tax was the same in each case that the tax was, therefore, "on the property" rather than the privilege of use.

Or, take the hypothetical situation of A, B and C selling perfume subject to Title 26, See, 4021. All sell at the same price. A makes a 10% profit on his sales, B makes a 15% profit, and C a 30% profit. It would be ridiculous to argue that the tax is "on" the perfume rather than the privilege of sale simply because each pays the same tax. The answer is that each enjoys the same privilege, namely, the privilege of sale.

Use Limited to Performance of Government Contracts

Appellants contend that the tax is invalid as applies to this particular case because Continental's use of the premises is confined to fulfilling contracts with the federal government. While it is true the property is being used in this particular instance and at this particular time solely for the production of material for the Army, we have no assurance that such will continue to be the case. See *United States and Borg-Warner Corp. vs. City of Detroit*, No. 26, presently on appeal to this court.

The argument is an equitable rather than a legal one. Though at first glance the argument has a degree of plausibility, it will not bear analysis, and definitely is not the law.

Directly in point and, we believe, conclusive of the issue, is *Curry vs. United States*, 314 U.S. 14, which should be read in the light of its companion case, *Alabama vs. King & Boozer*, 314 U.S. 1, 140 A.L.R. 615.

In the Curry case the respondent was performing work for the Government under a cost-plus contract. Respond-

ent had purchased a quantity of roofing material outside the State of Alabama which was shipped to an Army camp-site for use in performing the contract. The contract provided that title to such materials should vest in the Government "upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer." See *Alabama vs. King & Boozer*, 314 U.S. 1, 140 A.L.R., p. 619.

The court held the respondent liable for the Alabama use tax imposed upon the "storage, use or other consumption in the state of tangible personal property purchased at retail." Thus the privilege of using property owned by the federal government was held subject to tax though the privilege of use was limited to the sole purpose of fulfilling a contract with the federal government.

Appellants' claim that Continental "is strictly an agent or instrumentality for the United States" is answered in *Heneford vs. Silas Mason Co.*, 300 U.S. 577, where the plaintiffs, contractors and sub-contractors for construction of Grand Coulee Dam, had purchased extensive machinery and supplies in other states and brought them into the State of Washington for use in performance of their contracts. The Washington use tax was imposed and sustained. The claim made in the lower court (*Silas Mason Co. vs. Heneford*, 15 Fed. Supp. 958) "That the construction of the dam upon which plaintiffs are engaged under their contract with the United States is a government work in prosecution of which the Executive Department of the United States is exercising a franchise granted by Congress to construct a dam * * * to the end that navigation may be improved * * * and that * * * the plaintiffs are employed as agencies and instrumentalities of the United States, and their property is exempt * * *" was apparently abandoned on appeal.

In *Général Construction Co. vs. Eisker*, 39 P. (2nd) 358, 97 A.L.R. 1252, the plaintiff's sole business in Oregon was the construction of a dam under a contract with the Department of Interior. However, the Oregon tax on "net income," in this instance derived solely from the government contract, was sustained. And, the same result was reached in *Ralph Sollett & Sons Construction Co. vs. Comm.*, 161 Va. 854, 91 A.L.R. 774, appeal dismissed, 292 U.S. 599, where the plaintiff's business consisted ex-

clusively of constructing a post office under a contract with the federal government.

In *Wilson vs. Cook*, 327 U. S. 475, the appellant was held liable for a tax on the privilege of severing trees though the trees were cut from a national forest reserve, under a contract with the United States.

In each of the above cases, some privilege, limited and exercised solely for the purpose of performing a contract with the federal government, was held subject to tax. None of the contracting parties were regarded as an "agent or instrumentality" of the United States within the meaning of the immunity rule.¹

Appellant Continental's claim that it "is strictly an agent or instrumentality for the United States, using facilities of the United States to produce for the United States" and, inferentially, that it is not, therefore, subject to tax, is even more fully answered in *Kaiser vs. Reed, et al (United States, Intervenor)* (Cal. 1947) 184 Pac. (2d) 879.

It was apparently in deference to the Kaiser decision that the Military Leasing Act was amended and that Appellants concede Continental's "possessory interest" is subject to tax.

In the Kaiser case a tax was levied on the so-called "possessory interest" of lessees and occupants under the California General Property tax. See Sec. 107 of Cal. Rev. and Taxation Code.

The Kaiser Company was in possession of ship-building facilities owned by the government. Kaiser's use of the premises was "for the sole purpose of constructing vessels" for the government under a cost-plus contract. The contract was "not transferable", and contained an "optional cancellation clause" in favor of the government. Thus the factual background of the Kaiser case and the present case are parallel.

¹The only case that might be regarded as contrary to this view is *Kern-Limerick, Inc. vs. Scurlock*, 347 U. S. 110, involving an Arkansas sales tax. In that case the contractor was held to be "a private purchasing agent" for the government. Since the purchases were regarded as "made by the Government" the sales were held non-taxable. The case is thus readily distinguishable.

While it is true, the assessor applied an artificial and quite complicated formula to determine the supposed value of Kaiser's so-called "possessory interest", which was considered less than the fee, it should be kept in mind that the tax in that case was supposed to be a property tax rather than a privilege tax. In any event, that consideration goes to the question of the measure of the tax rather than the subject of the tax. Though the court in the Kaiser case termed the right of possession a "species of property" it is clear from a reading of the opinion that the thing taxed was, in reality, the privilege of use. As stated in that case, p. 886:

" * * * plaintiff's assessment stemmed from its use of the land and facilities in the shipyard as essentials to its production of ships at a profit, a right of possession consistent with its operation as an entrepreneur in business for its own account."

Measure of the Tax

It has already been demonstrated that non-taxable property may be included in the measure of a tax imposed upon a taxable privilege enjoyed in connection with the use of such property. Appellants complain that the full value of the property is used as the measure and contend that this is arbitrary.

The principle involved is far from new. It is interesting to note the similarity between Act 189 and *Anno. Laws of Mass., C. 59* Sec. 3.e which reads in part as follows:

"Real estate owned by, or held in trust for the benefit of the commonwealth or a city or town, if used or occupied for other than public purposes, shall be taxed to the lessee or lessees thereof, or their assigns, or to the occupant or person in possession thereof, in the same manner and to the same extent as if the said lessees or their assigns or the occupant or person in possession were the owners thereof in fee, free of any trust."

And see the annotation in 23 A. L. R. 248, p. 253, where the following reasoning is used in a case cited:

"The obvious difference between a leasehold of privately owned land the value of the fee of which is assessed against the owner, and one of public land the fee of which is not taxable, affords a tangible and reasonable basis for the classification and a different method of assessment. And we think that the provision that the value of leaseholds of public lands should be taken as that of the fee of the land demised, even though it may greatly exceed the actual value of the leasehold interest, is not, under the circumstances, open to objection."

Appellants contend the foregoing are property taxes and apply only to state or municipally-owned land. The question is the *reasonableness* of using the full value of the fee as the measure of the tax where the beneficial use is in private hands. If reasonable as to a property tax it is equally reasonable as to a privilege tax. The thing taxed in both instances is, in reality, the beneficial use of exempt property.

Appellants stress the fact that the tax does not apply insofar as federally-owned property is concerned if payments in lieu of taxes are made relative to such property. We can think of no way to make the tax more palpably unfair and unjust than to make it apply in such instances. There would be some merit to a claim that the tax is discriminatory if it applied under such circumstances. The chief virtue of the tax is that it equalizes the burden of local governments by imposing an equivalent tax upon those who enjoy the unique privilege of having the beneficial use of exempt property in connection with a business conducted for profit.

The case of *S. R. A. Inc. vs. Minnesota*, 327 U. S. 558, cited by appellants, supports the view that it is reasonable to tax one, having the beneficial use of property on the basis of the full value of the fee, even though his proprietary interest may be considerably less than a fee interest. In that case the petitioner was purchasing a vacant post office from the government. "The major portion of the contract price had not fallen due and was unpaid." A tax based upon the full value of the fee was sustained.

against the claim that the state had "included the interest of the United States" and "subjected that interest to taxation."

We can hardly think of any reasonable or practical measure of a tax upon the privilege of using exempt property in connection with a business conducted for profit without looking to the value of the fee. The value of the privilege of use necessarily varies in direct proportion to the value of the fee. The value of the use at any given time is the same whether it is exercised by a mere licensee, a tenant for years, or by the owner of the fee. Continental Motors Corporation derives exactly the same benefit from the *use* of the property during any given year whether it has a lease for 99 years, a lease for 5 years, or a mere license during that year.¹

Non-Discriminatory Character of Act 189

Appellants do not contend here, as they did in the courts below, that Act 189 discriminates against the federal government or the users of federally-owned property. Both courts below commented on the non-discriminatory character of the Act (R. 214-215; 225-227).

The inherent justice and fairness of the tax imposed by Act 189 is readily apparent. It is obvious that where a large and valuable piece of property (cost, \$8,352,768.30, with a rental value of \$364,032.00 per year) is turned over, rent free and tax free, to a private concern for use in connection with its business conducted for profit, the recipient indeed enjoys a unique and valuable privilege. Both the classification of those enjoying such special privilege as a subject for tax and the measuring of the tax on a basis which equalized the burden with those not so favored, is obviously reasonable and just.

The undesirability of a few exercising such a special privilege in an economy based upon free and equal com-

¹While it is true, if Continental's right of use should be terminated in any year shortly after tax day, it would not receive the full benefit of the property for that year. Unfortunately, there is no other practical way to administer the tax. A taxpayer whose house burns the day after assessment suffers a similar misfortune.

petition is readily apparent. And we believe this is true, even though the competition may be temporarily limited to the bidding for contracts with the federal government. Not only is the tax imposed by Act 189 fair and non-discriminatory, it reflects a sound and healthy public policy.

Appellants stress the largess of the federal government in making payments in lieu of taxes. It suffices to say that no payments were made in lieu of taxes as to the property involved here in 1954. Seemingly the federal government, with all its multitudes of bureaus, agencies and vast instrumentalities, forgot that Orchard View School District was required to educate the children of the employees of the Continental plant in 1954. Somehow it was forgotten that the County of Muskegon was required to furnish roads and other services used by the employees at the plant in common with other citizens of the community. It was forgotten that the Township of Muskegon was required to afford fire protection for all property in the Township, including the Continental Plant, during 1954.

We do not believe that local self-government has come to hang on such a tenuous thread that it may be effectively destroyed through oversight or the whim and caprice of a particular Congress.¹ We believe local self-government still retains the power of self-preservation.

We do not allude to the fact that the lands and plant involved here comprised some 52% of the assessed value of Orchard View School District prior to 1954 (R. 226) as a plea for equity. We point out that fact to bring the basic issue into bold relief. The issue is a judicial one rather than one for the legislature. Just as the whole doctrine of governmental immunity had its origin in a decision of the court, it is for the court to determine the proper scope and application of the doctrine in the light of the realities of present-day affairs.

¹Though similar legislation had been introduced in prior sessions of the Congress (see, for example, H. R. 206, introduced January 3, 1953) no legislation providing for payments in lieu of tax relative to the property involved here was adopted until *Public Law 388* of 1955. That Act is temporary in nature and is effective only until December 31, 1958.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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Nos. 37 and 38

JOHN T. FEY, Clerk

In The

Supreme Court of the United States

OCTOBER TERM, 1957.

UNITED STATES OF AMERICA, *Appellant*

TOWNSHIP OF MUSKEGON, a Municipal Corporation, et al.

CONTINENTAL MOTORS CORPORATION, ETC., *Appellant*

TOWNSHIP OF MUSKEGON, a Municipal Corporation, et al.

On Appeals from the Supreme Court of the
State of Michigan

BRIEF FOR NATIONAL ASSOCIATION OF
COUNTY OFFICIALS, *AMICUS CURIAE*

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THE INTEREST OF THE NATIONAL ASSOCIATION
OF COUNTY OFFICIALS

The National Association of County Officials is a membership corporation organized under the laws of the State of Delaware. It is under the control and management of its active members, numbering about 5,500, all of whom are officials in counties in 43 of the States of the Union.

The Association is a service organization serving county officials in their official capacities. One principal area of such service is that of the exemption from taxation of the large and increasing amount of property under ownership of the Federal Government. This is a matter of major concern to counties and other local governments because of their primary reliance for revenue upon the general property tax.

The seriousness of the impact of Federal tax exemption upon local governments was stated by the Commission on Intergovernmental Relations as follows:

"One aspect of the tax relations among governments requiring urgent attention is the immunity of the National Government from State and local taxation and the immunity of State and local governments from Federal taxation. In this area the problem of greatest concern to local governments is the tax status of Federal property. The immunity of Federally-owned property from State and local ad valorem taxation has reduced the tax base of many communities which rely on property taxes as their chief source of revenue. The impact of this immunity is uneven; it is particularly severe in areas where the value of Federal property is a large part of total property values."

"This problem has increased in importance with the acceleration of property acquisitions associated with the war and defense efforts and with divers other Federal programs, including urban housing, power production, resources conservation, and regional development and reclamation."

(Report of the Commission on Intergovernmental Relations, June, 1955, pages 107-108)¹

As of December 31, 1953 the real property, including improvements, owned by the United States consisted of 11,493 installations acquired at a cost of \$30,260,000,000. This was exclusive of public domain, national parks and

¹ The Commission was created by Public Law 109, 83d Cong., 1st Sess., 67 Stat. 145-147.

forests, land for other conservation uses, historical sites and trust properties. The total amount of all real property owned by the United States on the above date was 405,100,000 acres which is 21.3% of the total area of continental United States land, the equivalent of the area of all the States east of the Mississippi River except Kentucky, Tennessee, Mississippi and Alabama. Of the total value of \$30.2 billion of Federally owned property referred to above, 62% is held by the Department of Defense. (Inventory Report on Federal Real Property in the United States as of December 31, 1953, Senate Document No. 32, 84th Cong., 1st Sess., page 9).

This vast withholding from the reach of the local tax collector, of property taxable except for Federal ownership, imposes a heavy and increasing burden on local governments. In relation to that burden, it will be the purpose of this brief to invite attention to what we believe are pertinent implications of the premise noted in *McCullough v. Maryland*, 4 Wheat., 316, 428, that "it is admitted that the power of taxing the people and their property is essential to the very existence of Government". It is this "very existence" of local government which is threatened by the unlimited exercise of the power of the Federal Government to withdraw and withhold property from local taxation. The doctrine of sovereign immunity is being extended by the Federal agencies beyond legitimate bounds. Restriction within such bounds in cases like the present case is urgently needed.

II. ARGUMENT

The doctrine of *McCullough v. Maryland*, 4 Wheat., 316, is not applicable to and should not be extended to cover the situation presented in this case. Here the Government has abandoned action in its sovereign capacity in favor of procurement of goods and services through private commercial channels. This conforms to the estab-

lished policy of the Government to transfer to private business, as far as that may reasonably be done, all of the business type activities of the Government. It is the policy of the Department of Defense, however, to invoke the sovereign immunity from taxation to conserve the defense dollar, frequently at the cost, as in the present case, of denying tax collections by local governments, in order to save the funds of the Federal taxpayer. We submit that these two policies are mutually exclusive. In this case the private business concept clearly excludes resort by the Government to the concept of sovereign immunity.

A. The policy of the Federal Government to acquire its needed goods and services through private commercial channels, so far as is reasonably possible, has been stated as follows:

"2. *Policy.* It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels. Exceptions to this policy shall be made by the head of an agency only where it is clearly demonstrated in each case that it is not in the public interest to procure such product or service from private enterprise."

(Bulletin No. 55-4 of the Executive Office of the President, Bureau of the Budget, June 15, 1955)

B. While purporting to adhere to the foregoing principle in theory, the Department of Defense has, nevertheless, been unwilling to relinquish the inconsistent advantage of sovereign immunity from taxation. The Department's position was officially stated by Mr. Wilbur M. Brucker, General Counsel, Department of Defense, as set forth below. At the time of the statement quoted Mr. Brucker was testifying before a Senate Subcommittee in opposition to two bills (S. 2473 and H.R. 5605, 83d Cong.)

calling for payments to local governments in lieu of taxes on Federally owned property. He stated: "I would like to give a statement to the Subcommittee as to the reasons for opposition and then, if I could, I would like to file some papers with the Subcommittee for their consideration."

"The first reason for opposition is based on the principle of the sovereign's immunity from taxation.

"The second reason is based on the serious dissipation of the defense dollar."

At this point in the testimony reference was made to statistical illustrations drawn from cases pending in court to show the cost to the Defense Department if the bills under consideration were enacted. Various percentages of the value of the property of the Department were indicated as possible bases for computing the tax under the bills. The witness then concluded as follows:

"When we have pointed out these three illustrations that average well over 3 percent, we think that the 2 percent is a safe bet to give to this Subcommittee so that you can have the best information we can furnish you as to what you may look forward to with respect to the total bill to the Government."

"They may or may not make any difference. The Congress may decide it is willing to spend \$220 million, or \$120 million, or \$320 million, but we think you should have our estimate first in connection with the second argument here of the impact upon the appropriations for the Defense Department." (Hearings before Subcommittee on Legislative Program of the Committee on Government Operations, U.S. Senate, June 3, 1954 on S. 2473 and H.R. 5605).

C. In the present case the Department of Defense undertook procurement through regular commercial channels. The production and delivery of the goods and serv-

ices procured was not a government function at all but solely a function of private business selling goods and services to the Government. The use of Government property by the private contractor was at most a non-essential incident of the transaction.

Thus the entire arrangement was initiated by an "order" in regular form placed with a private business concern for a specified "production capacity" (R. 79). The contractor was not required to produce the necessary components, but was authorized to procure both materials and services through regular business channels by purchase or by subcontract (R. 87-88, 130, 134, 136). The contractor purchased required components in its own name, on its own obligation to make payment therefor, and took title initially in its own name (R. 81). Thereafter, title passed to the Government only upon inspection and approval by the Contracting Officer (R. 88, 92, §29). The contractor was required to provide insurance coverage both for damage to property and injury to persons (with specified excepted risks) (R. 93, 145), to hold the Government free from any claim for such damage or injury (R. 88). The contractor was required to pay all taxes, and all water, light, heat and other utility bills (R. 118) and to surrender Government property used in the same condition as when received, ordinarily wear and tear excepted (R. 118). There was a total absence of governmental supervision of the work other than the usual right of a purchaser to enter to inspect and approve before taking title and making payment. This was expressly reserved in the contract (R. 150).

The contractor was granted the right to use certain Government property, including the real estate used as a measure for the tax here in question. The consideration to the Government was reduction in the price of the product in an amount offsetting rent (R. 92-93). However, the contractor was not required to use the real

estate in its performance under the contract. It could manufacture either in the Government plant or its own plant or in the plants of subcontractors (R. 87-88, 130, 134; 136). On 60 days notice the contractor had the right at any time to terminate the contract with respect to its use of Government facilities, "but such termination did not relieve the contractor of any of its obligations or liabilities under any supply or service contract affected thereby" (R. 149). So long as the contract for the use of Government property was in effect, however, the contractor had exclusive control of it, except as stated above, for the right of access, expressly reserved to the Government, to enter for the purpose of inspection or inventorying or for the purpose of removing government owned facilities in the event of completion or termination of the contract (R. 150).

D. When the Government elects to procure goods and services by purchase in the open market, there is, of course, no ground, constitutional or otherwise, for excluding from the price that portion of the cost attributable to local property taxes. No doubt the major portion of all Government procurement is through purchase in the open market at prices reflecting the burden of local property taxes. Indeed, under the contract in this case it is clear that large portions of the final product bought by the Government were procured by the contractor from regular commercial sources at prices reflecting the taxes of the localities. The contract expressly provides for the payment of such prices. In the present case the Government merely furnished the use of its property (specifically for the purposes of this case the use of its real property) in partial payment for the goods and services which it bought from a private business contractor. It might grant the fee simple in real estate in payment for the products bought, or any lesser interest. The principle would be the same whether an interest in real property was provided as part of the purchase price.

or whether the entire price was paid in cash. It would not be contended, we suppose, that money paid by the Government for the purchase of goods could be clothed with the sovereign immunity from taxation in the hands of the vendor. Here the vendor was granted the use of the real estate. A tax upon the use is a tax on property received by the vendor as part of the price of goods and services sold.

There is no reason why other property, even real property, given by the Government in payment for goods purchased from a private vendor should be immune from taxation in the hands of the vendor. In either case the only significant results would be those of enhancing the purchasing power of the Federal payment by giving it a tax exempt status, on one side and on the other of correspondingly dissipating the tax dollar of the locality. It is not a governmental function, we submit, protected by sovereign immunity, in effect, to raise revenue for the Federal Government in this manner.

The principle enunciated in *McCullough v. Maryland*, *supra*, could apply in this case only in reverse. The doctrine as originally announced was designed as a shield of protection against attack upon the sovereign power of the United States. If applied to the facts in the present case it would become a sword of aggression, in effect, to attack the sovereign power of State and local government by restricting their powers of tax collection.

Moreover, viewed in this light, the statute of the State of Michigan is not a subterfuge to accomplish indirectly what could not be accomplished directly, as the appellees argue in their briefs. Rather, we submit the contract in the present case is a subterfuge attempted to be worked by the Department of Defense to accomplish indirectly what it could not do directly. The Department could not purchase goods and services in the open market and make payment in cash without bearing the burden of State

and local taxes that would be reflected in the prices charged. The endeavor in the present case is to achieve that same result through the device of paying for the product purchased in part by the granting of an interest in real property owned by the Government. However laudable the purpose of the Department of Defense to conserve the defense dollar, we believe there is no constitutional protection for the use of this device.

III. CONCLUSION

For the reasons set forth above it is respectfully submitted that no question of sovereign immunity from taxation is really involved in the present case and that the opposition to payment of the tax on any such ground should be overruled.

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FILED

NOV 13 1956

JOHN T. FEY, Clerk

No. 565 38

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

TOWNSHIP OF MUSKEGON, a municipal corporation,
COUNTY OF MUSKEGON, a municipal corporation,
ORCHARD VIEW RURAL AGRICULTURAL SCHOOL
DISTRICT NO. 5, MUSKEGON TOWNSHIP,
a municipal corporation,

Appellees

vs.

CONTINENTAL MOTORS CORPORATION, a Virginia
corporation doing business in the State of Michigan,

Appellant

and:

UNITED STATES OF AMERICA,

Intervening Appellant

*On Appeal from The Supreme Court
of the State of Michigan*

JURISDICTIONAL STATEMENT

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and

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No. 100-1000

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

TOWNSHIP OF MUSKEGON, a municipal corporation,
COUNTY OF MUSKEGON, a municipal corporation,
ORCHARD VIEW RURAL AGRICULTURAL SCHOOL
DISTRICT NO. 5, MUSKEGON TOWNSHIP,
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Appellees

vs.

CONTINENTAL MOTORS CORPORATION, a Virginia
corporation doing business in the State of Michigan,

Appellant

and

UNITED STATES OF AMERICA,

Intervening Appellant

*On Appeal from The Supreme Court
of the State of Michigan*

JURISDICTIONAL STATEMENT

Appellant, Continental Motors Corporation, appealed from the judgment of the Supreme Court of the State of Michigan, entered on June 28, 1956, affirming a judgment for appellees by the Circuit Court for Muskegon County, Michigan, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinions of the Circuit Court of Muskegon County, Michigan is not reported. A copy is attached hereto as Appendix A. The opinion of the Supreme Court of the State of Michigan is reported in 340 Mich. 218. A copy is attached hereto as Appendix C.

JURISDICTION

This suit was brought to collect unpaid 1954 taxes assessed pursuant to a statute of the State of Michigan (Act 189 of the Public Acts of Michigan for 1953). On August 23, 1955 judgment was entered in favor of the plaintiffs (appellees herein) by the Circuit Court for Muskegon County, Michigan, which on appeal was affirmed and judgment was entered on June 28, 1956 by the Supreme Court of the State of Michigan. Notice of Appeal was filed in the latter court on September 14, 1956. In both courts, appellants attacked the validity of the statute pursuant to which the taxes were assessed, on the ground that it is repugnant to the United States Constitution and both courts decided in favor of the validity of the statute. The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28, United States Code, Sections 1257(2) and 1261(C). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States et al v. Alton*

gheny County, 322 U.S. 174, 192; Standard Oil Co. v. Peck, Tax Commissioner et al., 342 U.S. 382, 383; Esso Standard Oil Co. v. Evans, 345 U.S. 495, 498.

STATUTE INVOLVED

Act No. 189 of the Public Acts of Michigan for 1953, p. 252 (Sects. 211.181 and 211.182, C.L. Mich. 1948, Vol. 5A, pages 530,531), hereinafter referred to as the Act or Act No. 189. The following is a full text thereof:

211.181. Taxation of lessees and users of tax-exempt property; exception.

Sec. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair-ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property; Provided, however, that the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

211.182. Assessment and collection; action by assessor.

Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit."

QUESTIONS PRESENTED

Stated broadly, may a State or any subdivision thereof impose a valid tax upon the occupant of an industrial plant which is owned by the United States and immune from taxation, when (i) the occupant is engaged in business for a profit but uses the plant only with the permission of the United States and solely for the production of supplies required for the performance of contracts with the United States Army, and with the United States of America, and (ii) the occupant is taxed in the same amount and to the same extent as though such occupant were the owner of such plant? More particularly, the questions are these:

1. Is the Act, as here applied, repugnant to the Constitution of the United States and invalid for the reason that it imposes a tax upon property of the United States used exclusively for the production of defense materials for the United States and which is immune from taxation by the State of Michigan or its subdivisions?

2. Is the Act repugnant to the Constitution of the United States and invalid for the reason that it attempts indirectly to accomplish the unconstitutional purpose of imposing a tax upon property owned by the United States by provid-

ing that the lessee or user of the property shall be taxed to the same extent and in the same manner as though such lessee or user was the owner of the property, except to the extent that the Federal Government makes payment in lieu of taxes with respect to the property?

3. If the Act may be construed as imposing a privilege tax, is it invalid, as here applied, for the reasons that it would impose a tax for the privilege of using federal property for the limited and sole purpose of providing materials for the common defense and supporting the army, which purposes are within the constitutional powers vested in the Federal Government and with respect to which Congress has legislated, and the exercise of the constitutional right of the Federal Government to dispose of and make all needful rules and regulations respecting its property in the carrying out of its functions may not be made the subject of a privilege tax by any state or its subdivisions?

4. If the Act may be construed as imposing a privilege tax, is it repugnant to the Constitution of the United States and invalid because it is discriminatory in its purpose and effect and is primarily directed at federally-owned property and is designed to subject to state taxation property which is constitutionally immune from such taxation?

5. Is immunity of federal property from taxation by a state determined by weighing the claimed burden upon a community or municipality against the benefits which the community or municipality derives as a result of the federal activity or by the claimed inequities arising between federal property which is immune from taxation and private property which is not?

STATEMENT OF THE CASE

Each of the appellees is a Michigan municipal corporation. They brought suit against the appellant, Continental Motors Corporation (hereinafter referred to as "Continental"), to collect unpaid 1954 taxes and fees totaling \$84,892.28, together with interest and penalties thereon. These taxes had been assessed, pursuant to the Act, to Continental as the user and occupant of an industrial plant owned by the United States of America on tax day (i.e., January 1, 1954), located in Muskegon Township, Muskegon County, Michigan, and generally known and referred to in Government contracts and correspondence as "Plant or 166".

By agreement, made prior to tax day, between Continental and the United States of America, the latter agreed to furnish to Continental the right to use and occupy the lands, buildings and machinery comprising Plant or 166 for the production of supplies in the performance of certain contracts with the Ordnance Corps of the Department of the Army and with the United States of America. This right to use was terminable at will by the United States. Continental was not required to pay any rental and it agreed not to add to its prices charged for defense goods made in said plant any element of cost for occupancy. Throughout 1953 and 1954 the plant was used exclusively for the production of material as provided in the aforesaid agreement.

Parcel 166 was valued by the Muskegon Township Supervisor, as of January 1, 1954, precisely as he would have done had it then been owned in fee simple by Continental and precisely in the manner ad valorem taxes are assessed. The valuation of the real estate, thus determined, was \$3,000,000 for one of the two parcels comprising the plant and \$5,200 for the remaining parcel. These valuations were set down on the ad valorem general property tax rolls of the Township opposite the description of the parcel to which each pertained. Tax bills were issued to Continental, as the occupant of the plant, based upon the assessment. These bills were not paid.

On February 1, 1955, appellees commenced this suit against Continental in the Circuit Court for the County of Muskegon, Michigan averring that the taxes and collection fees were assessed to Continental for the year 1954 pursuant to the provisions of the Act. Continental filed its answer, denied a valid assessment had been made and plead, among other things, that the Act was void, an infringement upon the immunity of the Federal Government and of Federally-owned property, and repugnant to enumerated provisions of the Constitution of the United States. The detailed provisions of the plea may be found on pages 10 through 12 of the printed Record on Appeal to the Supreme Court of Michigan as certified by the Clerk thereof and filed herein. Before trial the United States of America was granted permission to intervene as a party defendant. The case was tried on its merits. On June 29, 1955 the trial judge, in his opinion (Appendix A hereto), pointed out that one of the questions before the Court was:

"Whether the taxes assessed under Act 189, above, are an invasion of the federal right of immunity to taxation by another taxing authority?"

and after considering the matter at length, he reached the conclusion that:

"Act 189 does not violate federal immunity."

Judgment (Appendix B hereto) was entered against Continental in the Muskegon Circuit Court, and appellants filed a Claim of Appeal to the Supreme Court of the State of Michigan. Pursuant to the Rules of the latter court appellants filed a Statement of Reasons and Grounds for Appeal wherein they stated why the Act was invalid under the doctrine of Federal constitutional immunity, and repugnant to the Constitution of the United States. See pages 218 and 219 of the above mentioned printed Record on Appeal.

Thereafter, Continental filed its brief with the Supreme Court of the State of Michigan, in which it set forth five questions as follows:

1. Does Act No. 189 of the Public Acts of Michigan for 1953 impose an ad valorem property tax or a privilege tax?

2. Is Act No. 189 of the Public Acts of Michigan for 1953 invalid because it attempts to impose an ad valorem tax upon real property which was owned by the United States, was used solely for its benefit and was otherwise immune from local ad valorem taxation by the mere device of stating that it was taxing the lessees or users thereof in the same amount and to the same extent as though such lessee or user was the owner of such property, and thus attempts to defeat the impact of Federal constitutional immunity?

3. Even if Act No. 189 imposes a privilege tax, may the use of Federally-owned property by a corporation (engaged in business for a profit) for the limited purpose of enabling the Federal Government to carry out its constitutional power to provide for the common defense and support of the Army, be made the direct subject of a privilege tax imposed by a state?

4. Even if Act No. 189 of the Public Acts of Michigan for 1953 imposes a privilege tax is it invalid as a privilege tax because it is discriminatory in purpose and effect, and is primarily directed at Federally-owned property and designed to subject to state taxation property which is constitutionally immune from such taxation?

5. May the doctrine of Federal constitutional immunity from local taxation be vitiated because of the "burden upon a community or municipality" or so-called inequities against property not immune?

and each was argued at length in the brief.

In its opinion (Appendix C hereto) the Supreme Court of Michigan concluded the Questions 1 and 2 of the five questions had been firmly resolved against Continental's contention in *United States v. City of Detroit*,^{*} 345 Mich.

* In addition to the meritorious questions there raised by appellants; in the case at bar there is the additional important ground for supporting the proposition that Act 189 is repugnant to the Constitution of the United States because here the property was occupied for the sole purpose of providing defense materials and the tax is claimed by appellees to be upon a privilege granted by the United States for the purpose of carrying out a clear Constitutional duty whereas in the case of *United States v. City of Detroit*, the property was leased to a tenant and used by it for commercial purposes.

601, now appealed to the Supreme Court of the United States, and bearing number 487 in the October term. The Court failed to decide the third question. The Michigan Supreme Court concluded that Question 4 was without merit, and while failing to deal directly with Question 5, the tone and content of its opinion is such as to leave no doubt that the Court answered that question in the affirmative. The Court held that:

"Act No. 189 is valid and that the circuit judge was right in entering judgment for plaintiff local units by force thereof."

and affirmed the judgment below (Appendix D).

THE QUESTIONS ARE SUBSTANTIAL

The taxes, which appellees seek to recover herein, were levied pursuant to the Act. Appellant and intervening appellant attacked the validity of the Act, both in the trial court and later in the appellate court, on the ground that the Act was an infringement upon the doctrine of Federal immunity and repugnant to the Constitution of the United States. Each court decided in favor of the validity of the Act.

The question of whether or not the Act is repugnant to the Constitution of the United States is a matter of grave importance, not only to appellees and Continental but likewise to the United States of America and all taxing authorities wherever located. If the Act is valid as claimed by the appellees and the two courts below, the doctrine of

immunity of the Federal Government and its properties from State taxation can hereafter be successfully evaded by the simple device of taxing any user thereof, other than the Federal Government, even though such use may be solely for the purposes of carrying out objects clearly delegated to the Federal Government by the Constitution itself, such as the support of our Army and the defense of the nation. The impact of the lower courts' decisions, if permitted to stand, will clearly lead to similar legislation in other states and either (i), to a refusal by many contractors to use Government-owned property, unless the Government shall agree to pay taxes, such as those imposed upon the contractor for the use thereof, or (ii) the operation of each property by the Government itself, thus imposing burdens and restraints upon the Federal Government which are neither countenanced or required by the United States Constitution. The doctrine of Federal immunity, the right of the Federal Government to use its property as it deems proper, and the clear necessity for a strong central government capable of carrying out its objects free of interference by any state or subdivision thereof are each dangerously imperiled by this unique statute and the clearly erroneous decisions of the lower courts supporting its validity.

The hub of the argument is whether the Act imposes an ad valorem tax as we contend or a privilege tax as appellees contend and if it is a privilege tax is it valid?

1. The Act has all the characteristics and qualities of an ad valorem tax. The tax, by its terms, is and in this case was assessed in the same manner as taxes are assessed to owners of real property; the cash value of the fee simple

ownership in the tax-exempt real property was determined exactly as if such property was subject to ad valorem real property taxes; and, the user of the property was taxed, as required by the Act, in the same amount that would have been taxed had the user been the owner of the property. *Cooley on Taxes*, Fourth Edition, Vol. 1, page 443, points out that an ad valorem tax is a tax upon the value of an article or thing. The Act is indeed a tax upon the value of the real property. If, however, it be construed as a tax upon the privilege of use, it is nonetheless a tax based upon the value of a thing, for as was pointed out in *Hemford v. Mason*, 300 U.S. 577, 582, 586:

"... the privilege of use is only one attribute, among many, of the bundle of privileges that make up property... and... a tax upon use... is equivalent to a tax upon property..."

The Act, here being considered, is not couched in the language of a privilege tax nor is the tax graduated or measured in accordance with the exercise of the privilege to use. It is a tax based upon the value of Government property. In *United States v. Allegheny*, 322 U.S. 174, a tax based upon the value of Government property and imposed upon the bailee of such property was struck down with the statement at page 189, that:

"...Government owned property, to the full extent of the Government interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."

The assessment and tax thereon is invalid for all the reasons set forth in the *Allegheny* case. Calling an ad valorem tax a privilege tax does not make it a privilege tax. In

determining constitutional questions this Court looks to the substance and effect of the tax and is not bound by the State Court's determination thereof. See *United States v. Allegheny, supra*, where at page 184 it is said:

"Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted."

However, if it be determined that the tax imposed is a privilege tax, which it is not, then it must be concluded for the reasons hereinafter set forth that the tax is also invalid.

2. The Federal constitutional power to make all needful rules respecting the property of the United States (Article IV, Sec. 3, Cl. 2), for the purpose of providing materials required for the common defense and support of the army (Article I, Secs. 8(1) and 12), is vested exclusively in the United States Government, cannot be denied or interfered with by any State, nor be made the subject of a State privilege tax. Were we to permit the State to lay a tax such as this, upon those who have the privilege, granted to them by the Federal Government, of using its property solely for the purpose of enabling that Government to discharge the duties and exercise the powers exclusively granted to it under our Federal Constitution, we would indeed sanction an unlawful levy upon the means employed by the Federal Government to discharge its duties. In *Fan-Brocklin v. State of Tennessee*, *see*, 117 U.S. 151, 155, the United States Supreme Court said:

"The sovereignty of a State . . . does not extend to those means which are employed by Congress to carry

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into execution powers conferred on that body by the people of the United States. *The attempt to use the taxing power of a State on the means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse because it is the usurpation of a power which the people of a single State cannot give.*" (Emphasis supplied.)

The State can no more impose a privilege tax solely upon the use of Government-owned property than it can solely upon interstate commerce — both of which are clearly beyond the competence of the State to regulate or to tax. *Spector Motor Service v. O'Connor*, 340 U. S. 602, 608-9; *Railway Express Agency v. Virginia*, 347 U. S. 359.

In such cases as *Jones v. Dravo Contracting Co.*, 302 U. S. 134; *Alabama v. King & Boozer*, 314 U. S. 1, and *Esso Standard Oil Co. v. Evans*, 345 U. S. 495, all cited by the trial court, the tax was not upon a privilege or right to exercise a privilege granted by the United States, pursuant to a clear constitutional power, nor a tax upon the use of a privilege to use property owned by the United States. The taxes thereunder consideration were general, non-discriminatory privilege taxes; for the most part relating to occupational privilege taxes. They were not limited in scope or operation as is Act 189 — to Federally-owned property or to the exercise of a Federal function, either directly or indirectly. Act 189 is directed specifically at Federal property, or its use, as suggested by plaintiff's counsel in one of their briefs in the trial court, in which they said:

"It is clear that the legislature has Federally-owned property specifically in mind when it adopted Act 189."

There can be no doubt that an Act, so-designed, discriminates against the exercise by the Unit'd States of power over its property. Such discrimination is recognized as a sufficient ground for holding invalid any taxation adversely affecting the use or enjoyment of such power.

It should be noted also that those subject to the Act are obliged to pay a tax which they cannot collect from the owner. No remedy has been provided for that purpose and any remedy, if it has been provided, would be ineffective against the sovereign rights of The United States. On the other hand, lessées of the vast bulk of the real property in Michigan, if they are taxed at all under Section 21153 of the Compiled Laws of Michigan for 1948, are given an effective remedy to collect such taxes from the owner of such realty. (See, 21153, C.L. Mich. 1948). Thus, those few subject to Act 189, who use Federally owned tax immune realty, find themselves carrying a burden not imposed upon any other lessee or user of real property in Michigan. This too constitutes an unlawful discrimination against those engaged in the use of Federally owned real property.

Indeed, the discrimination evident in this case is the natural consequence of an effort to circumvent or evade the impact of a basic constitutional immunity. State legislatures are not free to strike indirectly under the guise of a privilege tax when the apparent aim and effect of the tax is primarily directed at the avoidance of such constitutional immunity.

Miller v. Milwaukee, 272 U. S. 713; *Missouri v. Gehner*, 281 U. S. 313, 321-2; *Hellerling v. Gerhardt*, 304 U. S. 405, 413; *New Jersey Realty Title Insurance Co. v. Div. of Tax Appeal*, 338 U. S. 665, 674-5; cf. *Pacific Co. v. Johnson*, 285 U. S. 480, 493-4.

4. The lower courts were obviously moved by hardships imposed if the doctrine of Federal Constitutional Immunity were honored and Act 189 were held invalid, as here applied. The Supreme Court of Michigan, in its opinion, favorably commented upon appellant's argument that Continental, having the use of tax-immune property, enjoyed the benefits of police and fire protection, roads, schools for the children of its employees and other benefits of local government, and the Court pointed out that the electors had been obliged to vote a substantial increase in their taxes in order to make school bonds salable due to the uncertainty as to whether Plancoor 166 was subject to taxation. These, the Court concluded, give a special meaning to the legislative purposes in the conception and enactment of Act 189, which the Court said:

"... it simply forces lessees and users for profit of tax-exempt lands to shoulder with others the burdens that are attendant upon benefits all of the class received." *Id.* at 103.

Constitutional immunity of Federally owned property is not overturned because to honor the immunity would discriminate against property not immune or because it places an added burden against the community or municipality where such immune property is situated. Nor can the prin-

Principle of Federal Constitutional Immunity be vitiated because of any so-called "equitable" argument. The very same argument was urged in and rejected by the United States Supreme Court in the *Allegheny* case, *supra*, in which the Court said at pages 189-191:

"Each party urges equities in its favor

"Such considerations remind us of our heavy responsibility in deciding the issues but hardly provide a guide or alter the usual principles for decision. *The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization.* . . . We can only say that *our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation in favor of their property interests. Their remedy lies in petition to the Federal Congress, which also is their Congress!*" (Emphasis supplied.)

CONCLUSION

It is submitted that the decision of the Supreme Court of Michigan is erroneous. We believe the questions presented by this appeal are substantial and that they are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

November 1956.

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APPENDIX A

Opinion of the Circuit Court for Muskegon County, Michigan

Plaintiffs bring this action for the collection of taxes assessed in the amount of \$84,658.20 for the year 1954 against the defendant Continental Motors Corporation with respect to certain real estate, and improvements thereon, owned by the United States but occupied by Continental under permit granted solely for the purpose of producing certain military supplies and equipment for the Department of the Army. The United States of America was granted leave to intervene as a party-defendant under claim of interest in the litigation which it claimed it was entitled to protect.

On January 1, 1954, the United States of America was the owner of a certain manufacturing plant, Planeor 166, located in Muskegon Township, Muskegon County, Michigan. The United States furnished this plant and its equipment to Continental under a permit to manufacture certain military equipment and supplies. Continental occupied this plant for this purpose without charge on January 1, 1954.

It was stipulated by these parties that the supervisor of Muskegon Township made an assessment of all of the real property in his township liable to taxation on tax day, i.e., January 1, 1954, at the true cash value, as required of him under Section 7.27 M.S.A.

It was further stipulated by these parties that pursuant to Act No. 489 of the P.A. of 1953 (M.S.A. 7.7(5)), the supervisor also valued as of that date the real property occupied by Continental and owned by the United States,

referred to as Planor 166, precisely as he would have done had such real property been owned in fee simple and occupied by Continental Motors Corporation; that he valued such real property at the true cash value of the fee simple ownership on the basis defined in Section 7.27 M.S.A., giving consideration to the advantages and disadvantages enumerated in such section; that the valuation of the real estate thus determined was \$3,000,000.00 for the parcel described in EXHIBIT 7 and \$5,200.00 for the parcel described in EXHIBIT 8; and such valuations were accordingly set down upon the tax rolls of such township opposite the description of the parcel to which each pertained and the aforesaid tax bills were thereafter issued by the Treasurer's office of the said Township to the defendant Continental Motors Corporation; that the parcels of real property described in such tax bills were not assessed to the occupant thereof pursuant to Section 7.3, M.S.A., and that the said supervisor did not determine as of January 1, 1954, the cash value of nor did he ever separately value the right to use and occupy such parcels granted to the defendant, Continental Motors Corporation, by the United States of America.

It was further stipulated by these parties that Continental Motors occupied these premises exclusively for the purposes outlined in the permits, EXHIBITS 1, 2, 3, and 4; that Continental is a corporation organized for profit, occupied these premises in connection with its business conducted for profit and made a profit out of such operations.

The taxes so assessed to Continental on January 1, 1954, have not been paid and plaintiff's seek to recover them by virtue of Act Act 189, P.L.A. 1953.

One of the questions before the court is whether the taxes assessed under Act 189 above, are an invasion of the Federal right of immunity to taxation by another taxing authority. Justice Jackson, in *U.S. v. County of Allegheny*, 322 U. S., 174, says:

"Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand."

Certain generalizations appear with frequency in the opinions covering this subject. So we learn that taxes on the properties, functions and instrumentalities of the Government are under constitutional proscription. *Maya v. U. S.*, 319 U. S. 441; *U. S. v. County of Allegheny, supra*; *Kern-Limerick, Inc., v. Sealock*, 347 U. S. 110. At the same time we learn that taxes on the property, functions and profits of private interest are held valid. *James v. Dravo Contracting Co.*, 302 U. S. 134; *Graves v. N.Y. Central O'Keefe*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *Oklahoma Tax Comm'n v. Texas Co.*, 336 U. S. 342; and *Esso Standard Oil Co. v. Evans*, 345 U. S. 495. And from the last group of citations we learn that an economic burden is no longer a factor in drawing the line of demarcation. Likewise these cases refer to a so-called new look at the subject of tax jurisdiction. It now appears that if the tax under scrutiny is not a direct tax on the property, function or instrumentality of the Government and if it is not discriminatory, it has a chance of survival.

Act 189, P.A. 1953, provides for taxation of lessees and users of tax-exempt property, when leased or used for profit. The incidence of the tax falls upon the lessee or

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user and not upon the owner. The property covered is all tax-exempt property, whether belonging to the United States Government or to the State of Michigan or any of its municipalities or institutions. The conclusion is that this tax is neither direct nor discriminatory.

Defendants lay great store in *U. S. v. County of Allegheny, supra*, and the statement found in that opinion to the effect that:

"... possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation."

There the court held that the value of machinery, owned by the United States Government, could not be added to the value of the real estate, owned by the lessee of the machinery in assessing the value of the plant for the purpose of levying a real property tax. The court considered such a tax as tax upon the Government's possessions. In a dissenting opinion, however, Justice Roberts thought that the court was again reverting to the use of the economic burden factor.

Our own State Supreme Court in *Fed. Reserve Bank v. Revenue Dep., 339 Mich. 587*, at page 598, distinguishes *Esso and U. S. v. Allegheny County*, both *supra*, by stating:

"... the reasoning of the court seems to boil down to that same concept, that it is the legal incidence and not the economic burden of a State tax to which the immunity or statutory exemption of a Federal instrumentality extends and that exemption of the intermediate person upon whom the legal incidence of the tax falls is not to be implied, regardless of the

fact that he passes its burden on to the United States, so long as Congress has not expressly exempted such person therefrom.¹⁵

So this court concludes that Act 189 does not violate Federal immunity.

A second question before the court is whether Act 189 violates Article X, Section 7 of the Michigan Constitution or State Constitution there provides:

"All assessments hereafter authorized shall be upon property at its cash value."

Does the fact that Act 189 requires the assessment against the owner to be for the same amount as though the user was the owner invalidate the tax? The reasonableness of this requirement is obvious. The worth of real estate bears some relationship to the burden it places upon a community or municipality. A large manufacturing plant brings into a community a relative number of employees with their families, homes and possessions. The burden upon the community is just the same whether the plant is immune from taxation or not. The property owner who is not immune is called upon to pay his fair share. It is equitable that the same basis should be used to require the user of immune or exempt property to pay its fair share. Any other basis would be unfair to the property owner tax payers. As this court views it, this is an indiscriminate feature of Act 189.

While this language of Act 189 is indefinite and incomplete a careful reading of the title and contents results in a conclusion that it was the legislative intent to tax the lessees or users of tax exempt property and not the prop-

erty or any interest therein. To this extent it is a tax upon a certain class or group who qualify under the definitions and exceptions of the Act. It has characteristics of a specific tax. It is only when we look at the method of computation of the tax that we note any ad valorem features.

Mr. Justice Cooley in his work on Taxation (2nd Ed., p. 238) describes ad valorem taxes as follows:

"Ad Valorem Taxes: A large proportion of the duties on imports are of this description, and so, sometimes, are many of the taxes which make up the internal revenue. The statute laying them prescribes the rule, but requires the action of appraisers, in *apportioning them* between individuals."

In the opinion of the court the State Constitution is not violated because the assessment was made at its cash value. The argument is made that the property taxes is the leasehold interest of the lessee or user. However, the language of the Act plainly states that the tax is on the *lessee or user*. In effect the Act provides that where the property is exempt from taxation but the lessee or user of the property qualifies the latter shall be taxed the amount that the owner would have paid except for the exemption.

Accordingly, the court finds that plaintiffs are entitled to a judgment against defendant Continental Motors Corporation in the amount of the tax, \$84,658.20, together with such penalties and interest as provided by law, but without costs, a public question being here involved.

Dated: June 29, 1955.

RAYMOND L. SMITH

Circuit Judge Presiding

APPENDIX B

Judgment of the Circuit Court for Muskegon County,
Michigan.

In this cause the plaintiffs having brought suit to recover the sum of \$84,658.20 representing taxes assessed to the defendant, Continental Motors Corporation, for the year 1954, together with interest and penalties thereon, and proofs having been submitted and the Court having considered the arguments and briefs of counsel and having filed a written opinion in the said cause;

It Is Ordered that a judgment be and same hereby is entered in favor of the plaintiffs and against the defendant, Continental Motor's Corporation, in the amount of \$84,658.20, together with such penalties and interest as is provided by law, such penalties and interest to be computed and taxed as costs as of the time this judgment is paid, but without the usual taxable costs, however, a public question being involved.

Dated this 23rd day of August, 1955.

RAYMOND L. SMITH
Circuit Judge, Presiding

APPENDIX C

Opinion of the Supreme Court of Michigan

This case is a direct descendant of *Continental Motors Corporation v. Township of Muskegon, et al.*, 346 Mich. 141. It marks the second and separate effort of a corporation hailing from Virginia and doing business for profit in Muskegon Township to find legal means of transferring its more than substantial share of the cost of local government to the shoulders of local payers of property taxes.

The property known in the records of both cases as Planecor 166 was deeded May 6, 1953 by RFC to the United States with result that on the next ensuing tax day (January 1, 1954) Planecor 166 concededly became and remained exempt from taxation. The fact of such conveyance was noted in the cited case at page 146 of the report and it with this suit transfers judicial attention from determination of validity of property taxes levied against Planecor 166, when title thereto stood in the name of RFC, to question whether the plaintiff taxing authorities lawfully assessed Continental, as continuing lessee for profit of Planecor 166 after title thereto passed to the United States, pursuant to PA 1953, No. 189.

Turning now to Continental's status under said act 189 in conjunction with the present suit: The supplemental agreement, by which Continental continued to use and op-

*CLS 1964, §§211.181, 211.182 [Stat. Ann. 1955 Cum. Supp., §§7.7(5), 7.7(6)]. The title clearly indicates the legislative purpose. It reads: "AN ACT to provide for the taxation of lessees and users of tax-exempt property."

cupy Planor 166 following transfer of title to the United States, contains this self-explanatory covenant:

"*6. The Contractor* shall pay to the properly constituted authority or authorities as and when the same may become due and payable all taxes, assessments, excises and similar charges which may be lawfully taxed, assessed or imposed upon the Contractor with respect to or upon Planor 166 or any part thereof, provided, however, that such taxes, assessments, excises or similar charges shall be proportioned and apportioned as of the date of this Agreement and as of the date of determination thereof respectively. Nothing herein contained, however, shall prohibit the Contractor from contesting in good faith the validity of any such taxes or assessments."

The 1954 assessment having been levied against Continental under said act 189 in the total sum of \$84,051.76, and Continental having refused to pay, this suit to recover the levy followed. Trial to the court, Honorable Raymond L. Smith, circuit judge, presiding, resulted in judgment for the plaintiff local units in accordance with their declaration and the present appeal by Continental to this Court. The substantial questions before us are stated by Continental as follows:

"1. Does Act No. 189 of the Public Acts of Michigan for 1953 impose an ad valorem property tax or a privilege tax?"

"2. Is Act No. 189 of the Public Acts of Michigan for 1953 invalid because it attempts to impose

*Continental is the "Contractor".

an ad valorem tax upon real property which was owned by the United States, was used solely for its benefit and was otherwise immune from local ad valorem taxation by the mere device of stating that it was taxing the lessees or users thereof in the same amount and to the same extent as though such lessee or user was the owner of such property and thus attempts to defeat the impact of Federal constitutional immunity?"

"4. Even if Act No. 189 of the Public Acts of Michigan for 1953 imposes a privilege tax is it invalid as a privilege tax because it is discriminatory in purpose and effect, and is primarily directed at Federally-owned property and designed to subject to state taxation property which is constitutionally immune from such taxation?"

Stated questions 1 and 2 were firmly resolved against Continental's contention in *United States v. City of Detroit*, 345 Mich. 601, and it is unnecessary to repeat what was said of such issues on that occasion. Stated question 4, dealing with alleged invidious discrimination against lessees of tax-exempt property engaged as the statute says in "business conducted for profit", deserves and will receive consideration.

Continental's counsel say, in support of question 4:

"It should also be noted that those subject to the Act are obliged to pay a tax which they cannot collect from the owner. No remedy has been provided for that purpose and any remedy, if it had been provided, would be ineffective against the sovereign rights of The United States. On the other hand,

lessees of the vast bulk of the real property in this State, if they are taxed at all under 7 $\frac{1}{2}$ M.S.A., are given an effective remedy to collect such taxes from the owner of such realty [7.97; M.S.A.]. Thus, those few subject to Act 189, who use Federally-owned tax-immune realty, find themselves carrying a burden not imposed upon any other lessee or user of real property in this State. This, too, constitutes an unlawful discrimination against those engaged in the use of Federally-owned real property.

The contention is without merit. Indeed, when it is searchingly examined in light of the companion records that are before us, we should in my view conclude that the legislature by Act 189 has wisely effe~~cuted~~^{minated} its continuing duty of providing equal burdens and equal privileges for those of corresponding or similar taxation. Without Act 189 a lessor or user for profit of federally owned tax immune realty becomes specially privileged and notably favored over his local classmates, and I refer to that class which directly shares the burdens as well as the benefits of local government. As counsel for plaintiffs say:

"When a large and valuable piece of property (Cost, \$8,552,768.30) which is tax ~~exempt~~, is putted over, *real taxes*, to a private individual, association or corporation, for use in connection with a business conducted for profit, it is quite obvious that the one having the use of such property has a valuable privilege. The one having the use of such property enjoys the benefits of police protection, fire protection, roads, schools for the children of his employees, and the other benefits of local government."

Counsel conclude with observation that one enjoying such a privilege should, as a matter of justice, be required to contribute to the support of his or its local units of government. While they do not elaborate further, I think we should record *sua sponte* some of the facts proving dire and present accuracy of their representations in the field of education—a field corporations like Continental eagerly reap when the crops thereof ripen in our engineering schools. June 23, 1952, the plaintiff school district voted to issue bonds in the sum of \$385,000 "for the purpose of erecting and furnishing an addition to the existing new school building in said district". The electors simultaneously provided 6 mills in accordance with Constitutional practice to support the issue. The bonds could not be sold. The reason is disclosed, this way, in a subsequent (December 30, 1952) resolution adopted by the board of education:

"WHEREAS, no bids were submitted for the purchase of the said bonds because of uncertainty expressed by the prospective purchasers relative to the present and future liability for taxes of the Continental Aviation and Engineering Corporation plant located in the said School District, which plant, consisting of the land and buildings thereon, constituted some 52.79% of the total assessed valuation of the entire School District;

In these circumstances of necessity the property taxpay-
ers and electors of the district were compelled at later spe-
cial election to vote an additional 8 mills, making 14 mills
in all extending from 1953 through 1975, to render the bonds

sable. When judges consider, as the court did in *Brown v. Board of Education of Topeka*, 347 U. S. 483** (74 S. Ct. 86; 25 L. ed. 873), that "Today, education is perhaps the most important function of state and local governments", we arrive at special understanding of legislative purpose in the conception and enactment of Act 189. It simply forces lessees and users for profit of tax-exempt lands to shoulder with others of the class the burdens that are attendant upon benefits all of the class receive.¹

The *Slaughter-House Cases* (16 Wall 36, 67-72, 21 L. ed. 394, 405-407; *Strader v. West Virginia*, 100 U. S. 303, 307, 308, 25 L. ed. 664, 666) were quoted with approval in the *Brown* case and, while not directly in point so far as Act 189 is concerned, the fact of such quotation is worthy of present consideration in that it brings to clearly focused light, again in this century, a predictive purpose of the Fourteenth Amendment that has always accompanied its prohibitory words—that of firm implication of right to positive immunity from legal discrimination. The implication thus becomes a continuing if unenforceable admonition to legislative assemblies of the several states that affirmative vigilance against and enactments preventive of inequality of legal protection are quite in order whenever such inequality exists or threatens. As the court said in *Strader*:

"The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those words as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immuni-

* This is the first of the so-called segregation cases.

ties, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property?"

Legislation designed toward equality in the sharing of burdens and benefits of local governments is reverence for rather than offense to our traditional right to equal protection of the laws. Act 189 is such legislation. It does not discriminate against lessees for profit of exempt property and commendably operates to prevent shocking discrimination in their favor. We accordingly hold as against this latest challenge that Act 189 is valid and that the circuit judge was right in entering judgment for the plaintiff local units by force thereof.

The presence of the United States as an intervening party is noted. The Government and its brief are welcome but do not distract from duty of determination whether the named defendant should or should not be judged liable to plaintiffs on account of the matters alleged in the declaration we have before us. This is a common law action brought by plaintiff units of local government. The declaration names a private corporation only as defendant. In the absence of Congressional action the judgment of the court belows when and if sued will be retired exclusively by the private defendant and not by the United States. No judgment has been entered against the United States, directly or indirectly. No tax was or is levied against its property and sovereign immunity of the United States from taxation and suit is not involved.

The judgment of the circuit court should be affirmed, with costs to plaintiff assessed against Continental only.

APPENDIX D**Judgment of the Supreme Court of Michigan****(Filed June 28, 1956)**

The records and proceedings in this case having been brought to this Court by appeal from the Circuit Court for the County of Muskegon, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is No Error, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Muskegon be and the same is hereby in all things affirmed, and that the plaintiffs do recover of the Continental Motors Corporation, their costs, to be taxed, and that they have execution therefor.